TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 404

MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1958
CERTIORARI GRANTED NOVEMBER 10, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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INDEX

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Appendix to Appellants' Brief No. 7608

UNITED STATES OF AMERICA,

vs.

MELROSE DISTILLERS, INC., et al.

INDICTMENT—Returned April 6, 1955

The grand jury charges:

COUNT ONE

I. The Defendants.

1. The Maryland State Licensed Beverage Association, Inc., (hereinafter sometimes designated as MSLBA) is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business in Baltimore, Maryland. The membership of said Association is composed of retailers of alcoholic beverages doing business as such in the State of Maryland.

2. The Maryland Package Liquor Stores Association, Inc., sometimes known as The Maryland Liquor Package Association, Inc., (hereinafter sometimes designated as MPLSA) is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business in Baltimore, Maryland. The membership of said Association is composed of retailers of alcoholic beverages doing business as such in the State of Maryland.

3. The Maryland Institute of Wine and Spirit Distributors, Inc., (hereinafter sometimes designated as MIWSD) is hereby indicted and made a defendant herein. Said

Association is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business in Baltimore, Maryland. The membership of said Association is composed of wholesalers of alcoholic beverages doing business as such in the State of Maryland.

4. The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing [fol. 2] business as a manufacturer, organized and existing under the laws of the State and with its principal offices in the city indicated hereinbelow. These defendants will sometimes hereinafter be referred to as "defendant manufacturers."

Name of Manufacturer	*State of Incorporation*	*Principal Offices*
National Distillers Products Corporation	Virginia	New York, New York
Joseph E. Seagram & Sons, Inc.,	Indiana	New York, New York
Distillers Distributing Corp.	Delaware	New York, New York
Hiram Walker & Sons, Inc.,	Michigan	Detroit, Michigan
Hiram Walker Incorporated	Delaware	Detroit, Michigan
Gooderham & Worts, Ltd.	Delaware	Detroit, Michigan
James Barclay & Co., Ltd.	Delaware	Detroit, Michigan
Schenley Industries, Incorporated.	Delaware	New York, New York
Schenley Distributors, Inc.,	New York	New York, New York
Melrose Distillers, Inc.	Maryland	New York, New York
Dant Distilling and Distributing Company	Delaware	New York, New York
CVA Corporation	Maryland	New York, New York
McKesson & Robbins, Inc.	Maryland	New York, New York
The Crosse & Blackwell Co.	Maryland	Baltimore, Maryland

[fol. 3] 5. The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a wholesaler of alcoholic beverages organized and existing or qualified under the laws of the State of Maryland and with its principal offices in the City

of Baltimore, Maryland. Each has been associated with the association indicted below. These defendants will sometimes hereinafter be referred to as "defendant wholesalers."

Name of Wholesaler	Association Affiliation
McCarthy-Hicks, Inc.	MIWSD
Churchill, Ltd.	MIWSD
The Kronheim Co., Inc.	
R.W.L. Wine & Liquor Co., Inc.	MIWSD
The Madera Bonded Wine & Liquor Co.	MIWSD
Reliable Liquors, Inc.	MIWSD
Gillett-Wright, Inc.	MIWSD

6. The following named individuals are hereby indicted and made defendants herein. Each of the said individuals is or has been associated, in the capacity indicated below, with one or more of the defendant associations, or with one of the defendant manufacturers, or with one of the defendant wholesalers, or with defendant association and a defendant other than the defendant associations. Said individual defendants, during the period covered by this indictment and within the applicable period of the statute of limitations have been actively engaged in the management, direction, or operation of the affairs, policies, and activities of the respective defendant organizations with which they are or have been associated, as indicated below, and within said period have authorized, ordered, or done some or all of the acts constituting and in furtherance of the offense hereinafter charged:

[fol. 4]

Name of Individual	Address
John A. Menton	Baltimore, Md.
Lawrence Franklin	Ijamsville, Md.
Jack Wulfert	Baltimore, Md.
I. William Schimmel	Baltimore, Md.
Robert E. Joyce	New York, N. Y.
Jeffery W. Clapp	Manhasset, N. Y.
B. C. Ohlandt	Glen Ridge, N. J.
John Turner	New York, N. Y.
Ellis D. Slater	New York, N. Y.

[fol. 5]

Walter F. Terry	New York, N. Y.
Frederick J. Lind	New York, N. Y.
John O. Brownell	New York, N. Y.
Harold S. Lee	New York, N. Y.
Ross Corbit	Detroit, Mich.

Business Affiliation	Association Affiliation
	Exec. V. Pres. MSLBA
	Financial Sec'y 1953 MSLBA
	President — MPLSA
	Exec. Sec'y MIWSD
V. Pres. National Distillers	
V. Pres. National Distillers	
V. Pres. National Distillers	
V. Pres. Distillers Distributing Corp.	
V. Pres. Distillers Distributing Corp.	
V. Pres. Distillers Distributing Corp.	
V. Pres. Joseph E. Seagram & Sons	
V. Pres. Distillers Distributing Corp.	
V. Pres. Distillers Distributing Corp.	
Pres. Hiram Walker & Sons	

Raymond Revit	Long Island, N. Y.
F. A. Wilson	Grosse Pointe Park, Mich.
N. M. MacDonald	Grosse Pointe Park, Mich.
Ralph T. Heymsfeld	New York, N. Y.
Murrel J. Ades	New York, N. Y.
[fol. 6]	
Newton Kook	Newark, N. J.
Max Sager	Brooklyn, N. Y.
J. D. Cotler	New York, N. Y.
John T. Menzies	Baltimore, Md.
Edward S. Buckler, Jr.	Baltimore, Md.
I. Strouse	Baltimore, Md.
Milton S. Kronheim	Washington, D. C.
Bernard Cohen	Washington, D. C.
[fol. 7]	
Morris A. Kasoff	Baltimore, Md.
Harvey Steinbach	Baltimore, Md.
Irving Smith	Baltimore, Md.
Harry W. Wright	Baltimore, Md.

V. Pres. Hiram Walker, Inc.	
V. Pres. Gooderham & Worts	
V. Pres. James Barclay & Co.	
Pres. Schenley Distributors	
V. Pres. Melrose Distillers	
Pres. Dant Distilling and Distributing Co.	
V. Pres. CVA Corporation	
V. Pres. McKesson & Robbins	
Pres. Crosse & Blackwell	
Sec'y McCarthy-Hicks	MIWSD
Pres. Churchill, Ltd.	MIWSD
Pres. The Kronheim Co.	
V. Pres. The Kronheim Co.	
V. Pres. R.W.L. Wine & Liquor	MIWSD
V. Pres. Treas. Madera Bonded Wine	MIWSD
Reliable Liquors, Inc.	MIWSD
V. Pres. & Treas. Gillett-Wright	

[fol. 8] 7. During all times hereinafter mentioned some of the corporate defendants named herein have wholly owned or controlled subsidiaries through which a portion of their business is transacted, and wherever in this indictment reference is made to any act or transaction on the part of any one of the said corporate defendants, it shall be deemed to include such act or transaction when performed by any of said subsidiaries.

II. Definitions

8. Whenever any of the following terms shall be used in this indictment it shall be deemed to mean as hereinafter defined:

(a) "Alcoholic Beverages" means alcohol, brandy, whiskey, rum, gin, cordial, wine, cider and any other spiritous, vinous, malt, or fermented liquor, liquid, or compound, by whatever name called, containing one-half of one-per centum or more of alcohol by volume, which is fit for beverage purposes, except beer as hereinafter defined;

(b) "Beer" as used in paragraph 3 (a) of this indictment means any brewed alcoholic beverage and includes beer, ale, porter, and stout; and

(c) "Manufacturer" means a person who operates a plant within the United States for distilling, rectifying, blending, fermenting, or bottling any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States, or is a distributor of alcoholic beverages selling to a wholesaler for resale to a retailer.

III. Nature of Trade and Commerce Involved.

9. Alcoholic beverages are marketed in the State of Maryland in a continuous flow of shipments from manufacturers located outside the State of Maryland, through wholesalers and retailers, to the consuming public. Under the laws of the State of Maryland, alcoholic beverages shipped and sold in bottles or packages by manufacturers [fol. 9] thereof are sold through the Department of Liquor Control for Montgomery County, and Liquor Control

Boards in other monopoly counties, and wholesalers licensed as such under the laws of Maryland to county dispensaries and other retailers. Thus, the Department of Liquor Control for Montgomery County, the Liquor Control Boards in other monopoly counties, wholesalers, and retailers are the conduit through which alcoholic beverages shipped from States of the United States other than the State of Maryland are sold and distributed to the consuming public within the State of Maryland.

10. Alcoholic beverages shipped and sold in bottles or packages by manufacturers are customarily sold in Montgomery County to the Department of Liquor Control for Montgomery County, in conformity with the laws of the State of Maryland. The Department of Liquor Control for Montgomery County sells alcoholic beverages through county liquor dispensaries to the consuming public. The Department of Liquor Control for Montgomery County, under the laws of the State of Maryland, has customarily purchased as a wholesaler alcoholic beverages direct from manufacturers. In the counties of Caroline, Dorchester, Harford, Kent, Somerset, Worcester, and Wicomico in the State of Maryland, alcoholic beverages are sold, under the laws of the State of Maryland, through county liquor dispensaries. Said counties, however, have customarily purchased alcoholic beverages from wholesalers licensed as such under the laws of Maryland, and said counties have not customarily operated as wholesalers. Said counties, including Montgomery County are monopoly counties. In all other counties in the State of Maryland in which alcoholic beverages are sold, such alcoholic beverages are shipped and sold in bottles or packages by manufacturers thereof to wholesalers licensed as such under the laws of Maryland who in turn sell to retailers licensed as such in the State of Maryland who sell to the consuming public. Said counties are open counties.

11. Approximately 90 per cent of all alcoholic beverages sold by retailers within the State of Maryland is produced [fol. 10] outside the State of Maryland and shipped therefrom into the State of Maryland for sale and distribution to the consuming public. The total quantity of alcoholic

beverages sold and distributed within the State of Maryland in 1954 was approximately 6,235,971 wine gallons (a wine gallon being 231 cubic inches by volume). Of this total quantity of alcoholic beverages sold in 1954 in the State of Maryland, approximately 5 per cent was sold through county dispensaries and approximately 95 per cent was sold through other retailers licensed under the laws of the State of Maryland. In 1954 approximately 319,692 wine gallons of alcoholic beverages were distributed and sold in Montgomery County for approximately $3,912,888.

12. In 1954 there were in the State of Maryland approximately 32 wholesalers of alcoholic beverages licensed under the laws of the State of Maryland and doing business in the State of Maryland in addition to the Department of Liquor Control for Montgomery County and the Liquor Control Boards of other monopoly counties in the State of Maryland. There were in 1954 in the State of Maryland approximately 8,783 retailers of alcoholic beverages in addition to county liquor dispensaries in the monopoly counties.

IV. The Conspiracy.

13. Beginning in or about the month of January 1950, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, the defendants named herein, and other persons to the Grand Jurors unknown, knowingly have entered into and engaged in an unlawful combination and conspiracy to raise, fix, maintain, and stabilize the wholesale and retail prices of alcoholic beverages shipped into the State of Maryland from manufacturers located outside the State of Maryland, which combination and conspiracy has been and is now in restraint of the hereinbefore described trade and commerce in alcoholic beverages among the several States in violation of Section 1 of the Act of Congress of July 2, 1890, entitled [fol. 11] "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U.S.C., Title 15, Section 1), as amended, commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and others to the Grand Jurors unknown, the substantial terms of which have been and are:

(a) That so-called "fair-trade" prices for alcoholic beverages be required to be established, and that manufacturers and wholesalers be required to enforce the observance of said prices and sell alcoholic beverages only to those retailers who observe and adhere to said prices;

(b) That retailers be required to observe and adhere to, or be induced and compelled to observe and adhere to, "fair-trade" prices on alcoholic beverages established as aforesaid;

(c) That no alcoholic beverages sold in the State of Maryland be sold directly by a manufacturer to the Department of Liquor Control for Montgomery County or the Liquor Control Boards of other monopoly counties, or be sold to said purchasers indirectly through a wholesaler at prices less than his customary resale prices; and

(d) That manufacturers, wholesalers, and retailers, shall boycott and refuse to deal with, and induce and compel others to boycott and refuse to deal with, those who do not establish, enforce, observe and adhere to the terms set out in subparagraphs (a) (b) and (c) above.

15. For the purpose of effectuating and carrying out the offense hereinabove described, the defendants, by agreement, understanding and concert of action, have done the things which, as hereinabove alleged, they conspired and agreed to do.

[fol. 12] V. Effects.

16. The effects of the offense hereinbefore alleged are and have been:

(a) To raise, fix, maintain and stabilize the wholesale and retail prices of alcoholic beverages shipped in interstate commerce into the State of Maryland and sold and distributed therein;

(b) To eliminate price competition among the defendant wholesalers and among retailers in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Maryland;

(c) To eliminate price competition among defendant wholesalers and the other members of defendant wholesalers' association, and among members of defendant retailers' associations in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Maryland;

(d) To eliminate direct sales of alcoholic beverages by manufacturers to monopoly counties acting as wholesalers;

(e) To raise the wholesale and retail prices of alcoholic beverages in Montgomery County;

(f) To require all interstate trade and commerce in alcoholic beverages to be channeled in the State of Maryland only through wholesalers; and

(g) To restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts.

17. It has never been and is not now the purpose, intent, or effect of said offense to promote the purpose of the Miller-Tydings Act amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) as amended, or the McGuire Act (66 Stat. 631, July 14, 1952) or the Maryland Fair Trade Act, or to establish wholesale and retail prices on alcoholic beverages for the protection of the good will in the trade-marks, brands, or names of the manufacturers or wholesalers of such alcoholic beverages.

[fol. 13] VI. Jurisdiction and Venue.

18. The offense herein alleged has been entered into and carried out in part within the District of Maryland. During the period of said offense and within the applicable period of the statute of limitations, the defendants have performed within the District of Maryland many of the acts and things set forth in paragraph 14 herein.

COUNT TWO

1. The Grand Jury realleges all of the allegations of paragraphs 1 through 12 of Court (sic) One of this indictment.

IV. Combination and Conspiracy to Monopolize.

2. Beginning in or about the month of January 1950, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, the defendants hereinbefore named, together with others to the Grand Jurors unknown, have entered into and engaged in an unlawful combination and conspiracy to monopolize the interstate trade and commerce in alcoholic beverages previously described herein in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U.S.C., Title 15, Section 2), as amended, commonly known as the Sherman Act.

3. The Grand Jury realleges all of the allegations of paragraphs 14 through 18 of Count One of this indictment.

COUNT THREE

1. The Grand Jury realleges all of the allegations of paragraphs 1 through 12 of Count One of this indictment.

IV. Attempt to Monopolize.

2. Beginning in or about the month of January 1950, the exact date being to the Grand Jurors unknown, and [fol. 14] continuously thereafter up to and including the date of the presentation of this indictment, the defendants

hereinbefore named, together with others to the Grand Jurors unknown, have been engaged in an attempt to monopolize the interstate trade and commerce in alcoholic beverages previously described herein in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U.S.C., Title 15, Section 2), as amended, commonly known as the Sherman Act.

3. In the aforesaid attempt to monopolize the defendants have done those things alleged in subparagraphs (a) through (d) of paragraph 14 of Count One of this indictment, which are hereby realleged.

4. The Grand Jury realleges all of the allegations of paragraphs 16 through 18 of Count One of this indictment.

(Signatures omitted)

IN UNITED STATES DISTRICT COURT

BILL OF PARTICULARS—Filed August 1, 1955

* * * * * * *

Section II

The Government submits the following answers in part to the requests:

* * * * * * *

2. The Government cannot state the time or approximate time each defendant entered into the conspiracy charged in paragraph 13 of the indictment since the conspiracy was a continuous and constantly developing overall plan composed and consisting of numerous and shifting acts, transactions, understandings and agreements of the defendants throughout its life, from which the conspiracy and entry into it by each defendant is implied. The Government has no present knowledge that any of the defendants withdrew from the conspiracy or ceased to be a participant therein before April 6, 1955.

3. The Government has no evidence of a single express agreement among the defendants which constituted the [fol. 15] conspiracy. The conspiracy as a whole is implied from the course of conduct of all defendants. The evidence which the Government has is such that it cannot say whether the joining of each defendant in the conspiracy was effected by an express agreement or understanding. It is inferred from all of the course of conduct of each defendant and in connection with the course of conduct of other defendants, including statements made, actions taken and understandings entered into from time to time during the period of each defendant's participation.

* * * * * * *

In United States District Court

Supplement to Bill of Particulars—
Filed November 14, 1955

2. The Government infers the existence of a conspiracy from the entire course of conduct of all the defendants and does not know the exact time when the conspiracy was formed. It expects to show the existence of the conspiracy by evidence of the acts of the defendants beginning with the earliest acts shown by the documents hereinafter described. The Government also states that the earliest acts of some defendants, shown by such documents, justify an inference that those defendants were engaged in the conspiracy in 1947.

The Government states that each of the defendants engaged in a course of conduct from which the Government infers that such defendant joined in the offenses alleged in the indictment. The Government can not state the exact time at which each defendant joined the conspiracy but relies on the entire course of conduct of each defendant as proof of such defendant's joining the conspiracy at some time during that course of conduct. The following documents are evidence of the first act or acts of the course of conduct engaged in by each defendant; they show the first acts or acts of each defendant which such defendant

must be prepared to defend at trial. The Government does not know of any oral testimony which it will use to prove such acts.

* * * * * * *

[fol. 16]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE INDICTMENT AS TO MELROSE DISTILLERS, INC., A DISSOLVED MARYLAND CORPORATION—Filed June 27, 1955

Seward W. Eric, Harry J. Greenwald, Lester J. Milich, Edward F. O'Brien, Milton B. Seasonwein and Kasper H. Seidel, being all of the Directors of Melrose Distillers, Inc., a Maryland corporation, at the time of its dissolution, move the Court to dismiss the indictment in this case and each count thereof as to the said Defendant, Melrose Distillers, Inc., and as grounds for said Motion say:

1. Melrose Distillers, Inc., a Maryland Corporation was dissolved under the laws of Maryland on May 2, 1955, on which date Articles of Dissolution were received and approved by the State Tax Commission of Maryland.

2. Said corporation was duly dissolved by the unanimous consent of all of its stockholders on the date above set forth under and pursuant to the provisions of Article 23, Sections 72 to 78 inclusive, of the Annotated Code of Maryland, 1951 edition.

3. This Motion is presented prior to arraignment of the said Defendant and prior to pleas to the charges of the indictment.

4. Certificate of Dissolution of Melrose Distillers, Inc., is filed herewith as a part hereof.

5. This Motion is supported by the affidavit hereto attached.

Seward W. Eric, Harry J. Greenwald, Lester J. Milich, Edward F. O'Brien, Milton B. Seasonwein, Kasper H. Seidel, By Markell, Veazey & Gans, Hilary W. Gans.

[fol. 17]

ATTACHMENT TO MOTION TO DISMISS—CERTIFICATE AND ARTICLE OF DISSOLUTION

State Tax Commission
31 Light Street
Baltimore 2, Maryland

Melrose Distillers, Inc.,
Baltimore, Maryland.

You are advised that the Articles of Dissolution of Melrose Distillers, Inc. has been received and approved by the State Tax Commission of Maryland this 2nd day of May, 1955 at 9:30 A.M. and will be recorded.

State Tax Commission of Maryland, By Albert W. Ward.

(Seal.)

Melrose Distillers, Inc.

Articles of Dissolution

This is to Certify:

Melrose Distillers, Inc., a Maryland corporation having its principal office in the City of Baltimore, State of Maryland (hereinafter called the Corporation), hereby certifies to the State Tax Commission of Maryland, that:

First: The Corporation is hereby dissolved.

Second: The name of the Corporation is as hereinabove set forth, and the post office address of the principal office of the Corporation in the State of Maryland is No. 10 Light Street, City of Baltimore, Maryland.

Third: The name and post office address of the resident agent of the Corporation in the State of Maryland, service of process upon whom shall bind the Corporation in any action, suit or proceeding pending or hereafter instituted or filed against the Corporation for one year after dissolution and thereafter until the affairs of the Corporation are wound up is The Corporation Trust Incorporated, No. 10 Light Street, City of Baltimore, Maryland. Said resident agent is a corporation of this State.

Fourth: The name and Post office address of each of the directors of the Corporation are as follows:

[fol. 18]

Name	Post-Office Address
Seward W. Eric	350 Fifth Avenue, New York 1, N. Y.
Harry J. Greenwald	350 Fifth Avenue, New York 1, N. Y.
Lester J. Milich	350 Fifth Avenue, New York 1, N. Y.
Edward F. O'Brien	350 Fifth Avenue, New York 1, N. Y.
Milton B. Seasonwein	350 Fifth Avenue, New York 1, N. Y.
Kasper H. Seidel	350 Fifth Avenue, New York 1, N. Y.

Fifth: The name, title and post-office address of each of the officers of the Corporation are as follows:

Name	Title	Post-Office Address
Harry Jay Greenwald	President	350 Fifth Avenue, New York 1, N. Y.
Seward W. Eric	Vice-Presidents	350 Fifth Avenue, New York 1, N. Y.
Edward F. O'Brien	"	350 Fifth Avenue, New York 1, N. Y.
Milton B. Seasonwein	"	350 Fifth Avenue, New York 1, N. Y.
Kasper H. Seidel	"	350 Fifth Avenue, New York 1, N. Y.
Milton B. Seasonwein	Secretary	350 Fifth Avenue, New York 1, N. Y.
Mayer H. Kasperschmidt	Treasurer	350 Fifth Avenue, New York 1, N. Y.
John T. Beamer	Assistant Sec'ys	350 Fifth Avenue, New York 1, N. Y.
John J. Dahill	"	350 Fifth Avenue, New York 1, N. Y.
Lester J. Milich	"	350 Fifth Avenue, New York 1, N. Y.
James E. Woolsey	"	350 Fifth Avenue, New York 1, N. Y.
John J. Dahill	Assistant Treas.	350 Fifth Avenue, New York 1, N. Y.

[fol. 19] Sixth: There are no known creditors of the Corporation.

Seventh: These Articles of Dissolution are acompanied (sic) by Certificates of the Comptroller of the Treasury of the State of Maryland and of the following collectors of taxes (being all collectors of taxes in the list thereof heretofore supplied to the Corporation by the State Tax Commission of Maryland) stating in effect that all taxes levied on assessments made by the said Commission and billed by and payable to such collecting authorities by the Corporation have been paid, except taxes barred by Section 210 of Article 81 or otherwise, including taxes billed for the year in which the dissolution of the Corporation is to be effected, namely: None.

Eighth: A majority of the whole board of directors of the Corporation, by resolution adopted at a meeting of the board of directors duly convened and held on the 20th day of April, 1955, duly advised the dissolution of the Corporation and called a meeting of the stockholders to take action thereon.

Ninth: A consent in writing to the dissolution of the Corporation was signed by all the stockholders of the Corporation, such consent is filed with the records of the Corporation, and the dissolution of the Corporation has been duly advised by the board of directors and authorized by the stockholders of the Corporation in the manner and by the vote required by Article 23 of the Annotated Code of Maryland (L. 1951, ch. 135).

In Witness Whereof, Melrose Distillers, Inc. has caused these presents to be signed in its name and on its behalf by its President or one of its Vice Presidents and its corporate seal to be hereunto affixed and attached by its Secretary or one of its Assistant Secretaries, on the 27th day of April, 1955.

Melrose Distillers, Inc., By Kasper H. Seidel, Vice-President.

Attest: Milton B. Seasonwein, Secretary.

[fol. 20]

State of New York, County of New York, ss.:

I Hereby Certify that on April 27, 1955, before me, the subscriber, a Notary Public of the State of New York, personally appeared Kasper H. Seidel, Vice President of Melrose Distillers, Inc., a Maryland corporation, and in the name and on behalf of said corporation acknowledged the foregoing Articles of Dissolution to be the corporate act of said corporation; and at the same time personally appeared Milton B. Seasonwein and made oath in due form of law that he was Secretary of the meeting of the board of directors of said corporation at which the dissolution of the corporation therein set forth was authorized, and the matters and facts set forth in said Articles of Dissolution are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal, the day and year last above written.

Nora A. Donovan, Notary Public.

(Seal)

State Tax Commission of Maryland

This is to Certify That the within instrument is a true copy of the Articles of Dissolution of Melrose Distillers, Inc. as approved and received for record by the State Tax Commission of Maryland, May 2, 1955 at 9:30 o'clock A.M.

As Witness my hand and official seal of the said Commission at Baltimore this 4th day of May, 1955.

Albert W. Ward, Secretary.

(Seal)

[fol. 21]

AFFIDAVIT OF MILTON B. SEASONWEIN

State of New York, County of New York, ss.:

I, Milton B. Seasonwein, being first duly sworn, depose and say:

I reside at 84 Penn Boulevard, Scarsdale, New York. I am Resident Attorney for Schenley Industries, Inc. and its

subsidiary corporations and have my office at 350 Fifth Avenue, New York 1, New York.

On September 24, 1952, the Federal Trade Commission filed a complaint (Docket No. 6048) against Schenley Industries, Inc. and certain of its subsidiaries, including CVA Corporation and Melrose Distillers, Inc. On June 18, 1953, an answer was filed. While the matter was referred to a Hearing Examiner, no hearings were ever held.

On October 27, 1953, the Board of Directors of Schenley Industries, Inc., approved the execution of the necessary stipulations required for the entry of a consent settlement in Docket No. 6048. On November 20, 1953, the stipulations were executed by the respondents in Docket No. 6048. On March 2, 1954, the consent settlement was approved by the Federal Trade Commission and mailed to each of the respondents on March 8, 1954. The consent settlement and the order to cease and desist entered in accordance therewith provided for the submission of a compliance report within one (1) year from the date of service upon the respondents.

The order to cease and desist created certain limitations on the operations of Schenley Industries, Inc. and its subsidiaries. These limitations made it necessary to arrange for the distribution in the United States of all of the alcoholic beverages (except beer) through a single sales company, thus necessitating the elimination of distribution by many subsidiaries, including Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corp.

Dant Distillery and Distributing Corp. had not been organized at the time of the service of the complaint by the Federal Trade Commission and was, therefore, not [fol. 22] named as a respondent in those proceedings. However, the cease and desist order applied to subsidiaries of Schenley Industries, Inc. which were not parties in the proceedings.

It was known, at the time execution of the stipulations relating to the consent settlement in Docket No. 6048 was authorized, that a reorganization of the corporate structure of the subsidiaries of Schenley Industries, Inc. would be required. For substantial commercial and legal reasons

such corporate reorganization took the form of the establishment of one corporation, with separate divisions operating under trade names as the selling company for the Schenley subsidiaries. For this purpose the corporate name of "Schenley Distributors, Inc." was changed to "Affiliated Distillers Brands Corp." after consideration of many other proposed names. The name change was effected as of December 27, 1954, and the single selling company set-up came into effect on January 1, 1955. As of the last mentioned date, Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corp. became inactive corporations. Counsel for the company was directed to effectuate the dissolution of said three corporations as soon as steps for that purpose could be taken by counsel.

The dissolution of the said three corporations was effectuated for the commercial and legal reasons above mentioned, none of which had anything to do with the indictment filed in the United States District Court for the District of Maryland.

Formal action with respect to the dissolution of the three corporations was approved at a meeting of the Board of Directors of Schenley Industries, Inc., on April 27, 1955. Similar action was taken by the Boards of Directors of the three corporations. The corporations were dissolved under the laws of Maryland (Melrose Distillers, Inc. and CVA Corporation) and Delaware (Dant Distillery and Distributing Corp.) on May 2, 1955.

Milton B. Seasonwein.

[fol. 23] Subscribed and sworn to before me this 23rd day of June, 1955.

Evelyn Boehm, Notary Public.

(Seal)

In United States District Court

Motion to Dismiss the Indictment as to Dant Distillery and Distributing Corp., a Dissolved Delaware Corporation—Filed June 27, 1955

Harold Baum, Harold Morris and Edward B. Rohn, Jr., being all of the Directors of Dant Distillery and Distributing Corp., a Delaware corporation, at the time of its dissolution, move the Court to dismiss the indictment in this case and each count thereof as to the said Defendant, Dant Distillery and Distributing Corp., and as grounds for said Motion say:

1. Dant Distillery and Distributing Corp., a Delaware corporation, was dissolved under the laws of Delaware on May 2, 1955, on which date Articles of Dissolution were received and approved by the Office of the Secretary of State of the State of Delaware.

2. Said corporation was duly dissolved by the unanimous consent of all of its stockholders on the date above set forth under the laws of Delaware.

3. This Motion is presented prior to arraignment of the said Defendant and prior to pleas to the charges of the indictment.

4. Certificate of Dissolution of Dant Distillery and Distributing Corp. is filed herewith as a part hereof.

5. This Motion is supported by the affidavit hereto attached.

Harold Baum, Harold Morris, Edward B. Rohn, Jr.,
By Markell, Veazey & Gans, Hilary W. Gans.

[fol. 24]

ATTACHMENT TO MOTION TO DISMISS—
CERTIFICATE OF DISSOLUTION.

State of Delaware
Office of Secretary of State

I, John N. McDowell, Secretary of State of the State of Delaware, do Hereby Certify that the Certificate of Incorporation of the "Dant Distributors, Inc.", was received and filed in this office the twenty-fifth day of February, A.D. 1953, at 11 o'clock A.M.;

And I do hereby further certify that the said "Dant Distributors, Inc.", filed a Certificate of Amendment of Certificate of Incorporation changing its corporate title to "Dant Distillery and Distributing Corp.", on the tenth day of March, A.D. 1953, at 11 o'clock A. M.;

And I do hereby further certify that the Certificate of Consent of Stockholders to Dissolution of the "Dant Distillery and Distributing Corp.", was received and filed in this office the second day of May, A.D. 1955, at 10 o'clock A.M.;

And I do hereby further certify that the Affidavit showing Publication of Certificate of Dissolution was received and filed in this office the second day of May, A.D. 1955, at 3 o'clock P.M.;

And I do hereby further certify that the aforesaid Corporation was duly dissolved according to the laws of the State of Delaware.

In Testimony Whereof, I have hereunto set my hand and official seal, at Dover, this second day of May in the year of our Lord one thousand nine hundred and fifty-five.

John N. McDowell, Secretary of State, M. D. Tomlinson, Ass't Secretary of State.

(Seal)

[fol. 25]

AFFIDAVIT OF MILTON B. SEASONWEIN

State of New York, County of New York, ss.:

I, Milton B. Seasonwein, being first duly sworn, depose and say:

I reside at 84 Penn Boulevard, Scarsdale, New York. I am Resident Attorney for Schenley Industries, Inc. and its subsidiary corporations and have my office at 350 Fifth Avenue, New York 1, New York.

On September 24, 1952, the Federal Trade Commission filed a complaint (Docket No. 6048) against Schenley Industries, Inc. and certain of its subsidiaries, including CVA Corporation and Melrose Distillers, Inc. On June 18, 1953, an answer was filed. While the matter was referred to a Hearing Examiner, no hearings were ever held.

On October 27, 1953 the Board of Directors of Schenley Industries, Inc., approved the execution of the necessary stipulations required for the entry of a consent settlement in Docket No. 6048. On November 20, 1953, the stipulations were executed by the respondents in Docket No. 6048. On March 2, 1954, the consent settlement was approved by the Federal Trade Commission and mailed to each of the respondents on March 8, 1954. The consent settlement and the order to cease and desist entered in accordance therewith provided for the submission of a compliance report within one (1) year from the date of service upon the respondents.

The order to cease and desist created certain limitations on the operations of Schenley Industries, Inc. and its subsidiaries. These limitations made it necessary to arrange for the distribution in the United States of all of the alcoholic beverages (except beer) through a single sales company, thus necessitating the elimination of distribution by many subsidiaries, including Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corp.

Dant Distillery and Distributing Corp. had not been organized at the time of the service of the complaint by the Federal Trade Commission and was, therefore, not named as a respondent in these proceedings. However, the cease

[fol. 26] and desist order applied to subsidiaries of Schenley Industries, Inc. which were not parties in the proceedings.

It was known, at the time execution of the stipulations relating to the consent settlement in Docket No. 6048 was authorized, that a reorganization of the corporate structure of the subsidiaries of Schenley Industries, Inc. would be required. For substantial commercial and legal reasons such corporate reorganization took the form of the establishment of one corporation, with separate divisions operating under trade names as the selling company for the Schenley subsidiaries. For this purpose the corporate name of "Schenley Distributors, Inc." was changed to "Affiliated Distillers Brands Corp." after consideration of many other proposed names. The name change was effected as of December 27, 1954, and the single selling company set-up came into effect on January 1, 1955. As of the last mentioned date, Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corp. became inactive corporations. Counsel for the company was directed to effectuate the dissolution of said three corporations as soon as steps for that purpose could be taken by counsel.

The dissolution of the said three corporations was effectuated for the commercial and legal reasons above mentioned, none of which had anything to do with the indictment filed in the United States District Court for the District of Maryland.

Formal action with respect to the dissolution of the three corporations was approved at a meeting of the Board of Directors of Schenley Industries, Inc., on April 27, 1955. Similar action was taken by the Boards of Directors of the three corporations. The corporations were dissolved under the laws of Maryland (Melrose Distillers, Inc. and CVA Corporation) and Delaware (Dant Distillery and Distributing Corp.) on May 2, 1955.

Milton B. Seasonwein.

[fol. 27] Subscribed and sworn to before me this 23rd day of June, 1955.

Evelyn Boehm, Notary Public.

(Seal)

In United States District Court

Motion to Dismiss the Indictment as to CVA Corporation, a Dissolved Corporation—Filed June 27, 1955

Henrietta Auerbach, Jean A. Montencourt, Paul I. Nederman, J. B. Popkin and Harry G. Serlis, being all of the Director (sic) of CVA Corporation, a Maryland corporation, at the time of its dissolution, move the Court to dismiss the Indictment in this case and each count thereof as to the said defendant, CVA Corporation, and as grounds for said Motion say:

1. CVA Corporation, a Maryland corporation, was dissolved under the laws of Maryland on May 2, 1955, on which date Articles of Dissolution were received and approved by the State Tax Commission of Maryland.

2. Said corporation was duly dissolved by the unanimous consent of all of its stockholders on the date above set forth under and pursuant to the provisions of Article 23, Sections 72 to 78 inclusive, of the Annotated Code of Maryland, 1951 edition.

3. This Motion is presented prior to arraignment of the said defendant and prior to pleas to the charges of the Indictment.

4. Certificate of Dissolution of CVA Corporation is filed herewith as a part hereof.

5. This Motion is supported by the affidavit hereto attached.

Henrietta Auerbach, et al., By Markell, Veazey & Gans, Hilary W. Gans, Attorneys for CVA Corporation.

[fol. 28]

ATTACHMENT TO MOTION TO DISMISS—
CERTIFICATE AND ARTICLES OF DISSOLUTION

State Tax Commission
31 Light Street
Baltimore-2, Md.

CVA Corporation,
Baltimore, Maryland.

You are advised that the Articles of Dissolution of CVA Corporation has been received and approved by the State Tax Commission of Maryland this 2nd day of May, 1955 at 9:30 A.M. and will be recorded.

State Tax Commission of Maryland, By Albert W. Ward.

CVA Corporation

Articles of Dissolution

This is to Certify:

CVA Corporation, a Maryland corporation having its principal office in the City of Baltimore, State of Maryland (hereinafter called the Corporation), hereby certifies to the State Tax Commission of Maryland, that:

First: The Corporation is hereby dissolved.

Second: The name of the Corporation is as hereinabove set forth, and the post office address of the principal office of the Corporation in the State of Maryland is No. 10 Light Street, City of Baltimore, Maryland.

Third: The name and post office address of the resident agent of the Corporation in the State of Maryland, service of process upon whom shall bind the Corporation in any action, suit or proceeding pending or hereafter instituted or filed against the Corporation for one year after dissolution and thereafter until the affairs of the Corporation are wound up, is The Corporation Trust Incorporated, No. 10 Light Street, City of Baltimore, Maryland. Said resident agent is a corporation of this State.

[fol. 29] Fourth: The name and post office address of each of the directors of the corporation are as follows:

Name	Post-Office Address
Henrietta Auerbach	350 Fifth Avenue, New York 1, N. Y.
Jean A. Montenecourt	350 Fifth Avenue, New York 1, N. Y.
Paul I. Nederman	582 Market Street, San Francisco, California.
J. B. Popkin	350 Fifth Avenue, New York 1, N. Y.
Harry G. Serlis	582 Market Street, San Francisco, California.

Fifth: The name, title and post-office address of each of the offiicers (sic) of the Corporation are as follows:

Name	*Title*	*Post-Office Address*
Harry G. Serlis	Chairman of the Board	582 Market Street, San Francisco, Calif.
Paul I. Nederman	President	582 Market Street, San Francisco, Calif.
Jean A. Montenecourt	Vice Presidents	350 Fifth Avenue, New York 1, N. Y.
Max Sager	"	Chanin Building, 122 East 42nd Street, New York, N. Y.
Leonard J. Rosenfeld	Secretary	350 Fifth Avenue, New York 1, N. Y.
Jesse Ratner	Treasurer	350 Fifth Avenue, New York 1, N. Y.
[fol. 30]		
Beatrice Dunn	Assistant Secretaries	350 Fifth Avenue, New York 1, N. Y.
Frank M. Famental	"	350 Fifth Avenue, New York 1, N. Y.
Milton B. Seasonwein	"	350 Fifth Avenue, New York 1, N. Y.
James E. Woolsey	"	582 Market Street, San Francisco, Calif.
Henrietta Auerbach	Assistant Treasurers	350 Fifth Avenue, New York 1, N. Y.
J. B. Popkin	"	350 Fifth Avenue, New York 1, N. Y.

Sixth: There are no known creditors of the Corporation.

Seventh: These Articles of Dissolution are accompanied by Certificates of the Comptroller of the Treasury of the State of Maryland and of the following collectors of taxes (being all collectors of taxes in the list thereof heretofore supplied to the Corporation by the State Tax Commission of Maryland) stating in effect that all taxes levied on assessments made by the said Commission and billed by and payable to such collecting authorities by the Corporation have been paid, except taxes barred by Section 210 of Article 81 or otherwise, including taxes billed for the year in which the dissolution of the Corporation is to be effected, namely: None.

Eighth: A majority of the whole board of directors of the Corporation, by resolution adopted at a meeting of the board of directors duly convened and held on the 20th day of April, 1955, duly advised the dissolution of the Corporation and called a meeting of the stockholders to take action thereon.

Ninth: A consent in writing to the dissolution of the Corporation was signed by all the stockholders of the [fol. 31] Corporation, such consent is filed with the records of the Corporation, and the dissolution of the Corporation has been duly advised by the board of directors and authorized by the stockholders of the Corporation in the manner and by the vote required by Article 23 of the Annotated Code of Maryland (L. 1951, ch. 135).

In Witness Whereof, CVA Corporation has caused these presents to be signed in its name and on its behalf by its President or one of its Vice Presidents and its corporate seal to be hereunto affixed and attested by its Secretary or one of its Assistant Secretaries, on the 27th day of April, 1955.

CVA Corporation, By Jean A. Montenecourt, Vice President.

Attest: Leonard J. Rosenfeld, Secretary.

(Seal)

State of New York, County of New York, ss.:

I Hereby Certify that on April 27, 1955, before me, the subscriber, a Notary Public of the State of New York, personally appeared Jean A. Montenecourt, Vice President of CVA Corporation, a Maryland corporation, and in the name and on behalf of said corporation acknowledged the foregoing Articles of Dissolution to be the corporate act of said corporation; and at the same time personally appeared Leonard J. Rosenfeld and made oath in due form of law that he was Secretary of the meeting of the board of directors of said corporation at which the dissolution of the corporation therein set forth was authorized, and the matters and facts set forth in said Articles of Dissolution are true to the best of his knowledge, information and belief.

[fol. 32] Witness my hand and notarial seal, the day and year last above written.

Nora A. Donovan, Notary Public.

(Seal)

State Tax Commission of Maryland

This is to Certify That the within instrument is a true copy of the Articles of Dissolution of CVA Corporation as approved and received for record by the State Tax Commission of Maryland, May 2, 1955 at 9:30 o'clock A.M.

As Witness my hand and official seal of the said Commission at Baltimore this 4th day of May, 1955.

Albert W. Ward, Secretary.

AFFIDAVIT OF MILTON B. SEASONWEIN

State of New York, County of New York, ss.:

I, Milton B. Seasonwein, being first duly sworn, depose and say:

I reside at 84 Penn Boulevard, Scarsdale, New York. I am Resident Attorney for Schenley Industries, Inc. and

its subsidiary corporations and have my office at 350 Fifth Avenue, New York 1, New York.

On September 24, 1952, the Federal Trade Commission filed a complaint (Docket No. 6048) against Schenley Industries, Inc. and certain of its subsidiaries, including CVA Corporation and Melrose Distillers, Inc. On June 18, 1953, an answer was filed. While the matter was referred to a Hearing Examiner, no hearings were ever held.

On October 27, 1953, the Board of Directors of Schenley Industries, Inc., approved the execution of the necessary stipulations required for the entry of a consent settlement in Docket No. 6048. On November 20, 1953, the stipulations were executed by the respondents in Docket No. 6048. On March 2, 1954, the consent settlement was approved by the Federal Trade Commission and mailed to [fol. 33] each of the respondents on March 8, 1954. The consent settlement and the order to cease and desist entered in accordance therewith provided for the submission of a compliance report within one (1) year from the date of service upon the respondents.

The order to cease and desist created certain limitations on the operations of Schenley Industries, Inc. and its subsidiaries. These limitations made it necessary to arrange for the distribution in the United States of all of the alcoholic beverages (except beer) through a single sales company, thus necessitating the elimination of distribution by many subsidiaries, including Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corp.

Dant Distillery and Distributing Corp. had not been organized at the time of the service of the complaint by the Federal Trade Commission and was, therefore, not named as a respondent in these proceedings. However, the cease and desist order applied to subsidiaries of Schenley Industries, Inc. which were not parties in the proceeding.

It was known, at the time execution of the stipulations relating to the consent settlement in Docket No. 6048 was authorized, that a reorganization of the corporate structure of the subsidiaries of Schenley Industries, Inc. would be required. For substantial commercial and legal reasons such corporate reorganization too (sic) the form of the

establishment of one corporation, with separate divisions operating under trade names as the selling company for the Schenley subsidiaries. For this purpose the corporate name of "Schenley Distributors, Inc." was changed to "Affiliated Distillers Brands Corp." after consideration of many other proposed names. The name change was effected as of December 27, 1954, and the single selling company set-up came into effect on January 1, 1955. As of the last mentioned date, Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corp. became inactive corporations. Counsel for the company was directed to effectuate the dissolution of said three corporations as soon as steps for that purpose could be taken by counsel.

[fol. 34] The dissolution of the said three corporations was effectuated for the commercial and legal reasons above mentioned, none of which had anything to do with the indictment filed in the United States District Court for the District of Maryland.

Formal action with respect to the dissolution of the three corporations was approved at a meeting of the Board of Directors of Schenley Industries, Inc., on April 27, 1955. Similar action was taken by the Boards of Directors of the three corporations. The corporations were dissolved under the laws of Maryland (Melrose Distillers, Inc. and CVA Corporation) and Delaware (Dant Distillery and Distributing Corp.) on May 2, 1955.

Milton B. Seasonwein.

Subscribed and sworn to before me this 23rd day of June, 1955.

Evelyn Boehm, Notary Public.

(Seal)

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO PLEADINGS ETC.

It is hereby stipulated and agreed by and between the parties to this case, through their respective counsel, that any Defendant may without prejudice, by a paper signed by his counsel and filed in this case, adopt in whole or in part any pleading, motion, subpoena, or other paper there-

tofore filed in this case by any other Defendant, without the necessity for setting forth said pleading, motion, subpoena, or other paper in full.

Dated: June 21, 1955

(Signatures omitted)

[fol. 35]

IN UNITED STATES DISTRICT COURT

ORDER APPROVING STIPULATION

It is the 29th day of June, 1955, by the United States District Court for the District of Maryland—

Ordered that the foregoing Stipulation dated June 21, 1955, be and it is hereby approved.

Roszel C. Thomsen, U. S. District Court, Chief Judge.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE INDICTMENT AS TO MARYLAND INSTITUTE OF WINE AND SPIRIT DISTRIBUTORS, INC., ET AL.—Filed November 29, 1955

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure and leave of Court heretofore granted, defendants Maryland Institute of Wine and Spirit Distributors, Inc. and I. William Schimmel, and each of them, move the Court as follows:

A.

To dismiss Counts One and Two of the Indictment, and each of them, on the following grounds appearing upon the face of the Indictment, and/or the Particulars thereof heretofore furnished by the Government, and/or the admissions and concessions made by the Government in open Court with respect thereto:

1. Counts One and Two, and each of them, do not, within the meaning and requirements of Rule 7 of the Federal Rules of Criminal Procedure or otherwise, constitute

plain, concise and definite written statements of the essential facts constituting the offenses charged, or attempted to be charged, or any offense over which this Court has jurisdiction, but, on the contrary, are fatally defective in that they are too vague, indefinite, confusing, uncertain in meaning and contradictory in their allegations to require defense thereto, or to enable the defendants adequately to prepare defenses thereto, or to enable the defendants adequately to plead former conviction or acquittal [fol. 36] or double jeopardy to said Indictment or to any later indictment or information which may be brought against them, and so vague, indefinite, confusing, uncertain in meaning and contradictory in their allegations that any trial or conviction of law and contravene the Fifth Amendment to the Constitution of the United States.

2. Count One fails to charge an offense violative of Section 1 of the Sherman Act, or any offense over which this Court has jurisdiction, and Count Two fails to charge an offense violative of Section 2 of the Sherman Act, or any offense over which this Court has jurisdiction, for the reasons (a) that the alleged acts and conduct of the defendants charged, or attempted to be charged, therein, and the purposes, objectives and effects thereof, were permitted, sanctioned and encouraged by the announced governmental policy and law of the State of Maryland and the statutes (including Maryland Code, Art. 2B, Secs. 104 and 105 and Art. 83, secs. 102-115) and Court decisions of said State, which state policy and law regarding alcoholic beverages has preempted the field of policy and law relating thereto and to the marketing thereof and is paramount by reason of the Twenty-first Amendment to the Constitution of the United States (b) that hence said alleged acts and conduct of the defendants are not within the ambit of the Sherman Act or forbidden by its provisions; (c) that the offenses charged, or attempted to be charged, would promote and further the announced governmental policy and law of the State of Maryland, and the objectives thereof, and hence constituted activity protected from the reach of the Sherman Act; (d) that, if the Sherman Act should be construed to apply to, forbid and punish said alleged acts and conduct of the defendants, it would, to that

extent, conflict with, burden and obstruct the said policy and law of the State of Maryland, and the objectives thereof, and would be unconstitutional and void to that extent as in contravention of the Twenty-first Amendment of the Constitution of the United States; and (e) that any trial or conviction of the defendants on said Counts One and Two would conflict with said policy, law, statutes [fol. 37] and Court decisions of the State of Maryland and the administration of said policy and laws, and would deny to the defendants their rights under the same and contravene the Twenty-first Amendment to the Constitution of the United States.

3. Count One fails to charge an offense violative of Section 1 of the Sherman Act, or any offense over which this Court has jurisdiction, and Count Two fails to charge an offense violative of Section 2 of the Sherman Act, or any offense over which this Court has jurisdiction, because, by reason of the Twenty-first Amendment to the Constitution of the United States, any restraints and/or monopolization of trade and commerce in alcoholic beverages which are within the ambit of the Sherman Act and forbidden by its provisions must be factually unreasonable, within the Rule of Reason, in the light of the purposes, objectives, effects and all the surrounding circumstances thereof, including the policy and law of the State of Maryland mentioned in paragraph 2 hereof, and the objectives thereof, and relevant federal laws and statutes, including the Miller-Tydings Act (U. S. C. Title 15, Sec. 1), the McGuire Act (U. S. C. Title 15, Sec. 45), the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13a); and Counts One and Two fail to charge facts showing that the alleged acts and conduct of the defendants charged therein were so unreasonable but, on the contrary, allege facts showing that the same were reasonable and justified within the Rule of Reason.

B.

To dismiss Count Two of the Indictment on the ground that it fails to charge an offense violative of Section 2 of the Sherman Act, or any offense over which the Court has

jurisdiction, because, except for an unwarranted legal conclusion of the pleader, it alleges no facts showing, or tending to show, that the nature, purposes, objectives or effects of the combination and conspiracy charged, or attempted to be charged, therein were to monopolize any part of trade or commerce in alcoholic beverages and/or to forestall, [fol. 38] regrate or engross said trade or commerce, or any part thereof, and/or to exclude or deter any person or persons from the market or from engaging in said trade or commerce, or any part thereof, and/or unify and corner in one or a number of persons said trade or commerce or any part thereof, but, on the contrary, said Count Two, on its face, and as explained and limited by the Particulars heretofore furnished by the Government and by the admissions and concessions with respect thereto, and with respect to the facts which the Government proffers to prove in support thereof, made by the Government in open Court, affirmatively shows that Count Two charges no more than that charged, or attempted to be charged, by Count One, which, in turn, does not allege facts constituting a combination or conspiracy to monopolize; that all combinations and conspiracies in restraint of trade or commerce violative of Section 1 of the Sherman Act, including the combination and conspiracy attempted to be charged in Count One, are not also combinations and conspiracies violative of Section 2 of the Sherman Act; that, if the Sherman Act should otherwise be construed and applied, it would to that extent be unconstitutional and void as in contravention of the Fifth Amendment to the Constitution of the United States; and that, if the defendants should be tried and/or convicted on both Counts One and Two, they would be placed in double jeopardy and denied due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

C.

In the alternative to B above, to require the Government at this time to elect either Count One or Count Two of the Indictment and to dismiss whichever Count is not elected, for the reason that Count One and Count Two both charge facts constituting one, and only one, alleged offense

(namely, either a combination and conspiracy in restraint of trade violative of Section 1 of the Sherman Act or a combination and conspiracy to monopolize violative of Section 2 of the Sherman Act). That identity of the two Counts and of the offense attempted to be charged by each [fol. 39] is shown on the face of the Indictment by the identity *in haec verba* of the factual allegations of each as distinguished from the legal conclusions of the pleader set forth therein. This identity is confirmed and strengthened by the Particulars heretofore furnished by the Government in answer to defendants'. Request for Particulars No. 96 which are as follows:

"96. Furnish the information herein requested (the other numbered requests) in respect of every count of the indictment."

Answer to 96. "The same course of conduct is alleged in all three Counts of the indictment and the proof of that course or conduct under Count One will be relied upon as proof of the other Counts."

This identity is further confirmed and strengthened by the concession made by the Government in open Court on September 14, 1955, which is as follows:

"That is what we want, Your Honor, when we stated, in answer to 96, that the proof would consist of the same course of conduct in all three counts, there would be no variation as far as proof is concerned on either the count as distinguished from any other count." (See Transcript p. 329).

That the above concession was made advisedly by the Government is established by its reiteration thereof on page 12 of its Brief In Opposition to Defendants' Exceptions to its Bill of Particulars as follows:

"In this case, the Government has answered (Answer No. 96) that it relies on the course of conduct and the same evidence of that course of conduct, under all Counts of the indictment."

The above quoted Particulars and concession are binding upon the Government as to the identify of the offense

charged in both said Counts, and, further preclude it from contending that Counts One and Two are alternative charges to be ruled upon only in the light of whether the [fol. 40] proof to be later submitted in support of each will differ and, if so, to what extent.

Trial of the defendants upon both of two Counts, which are admittedly pure duplication and identical in nature, *allegata* and *probata*, and each factually charging an identical offense to be proved by identical evidence, is not permitted by the Sherman Act as properly construed; the Sherman Act, if construed to permit such trial upon both Counts, would be unconstitutional and void, to that extent, as in contravention of the Fifth Amendment to the Constitution of the United States; and such trial would place the defendants in double jeopardy and deny to them due process of law in contravention of said Fifth Amendment.

To dismiss Counts One and Two of the Indictment as to the defendant I. William Schimmel, on the grounds that he, and the other individual defendants, are specifically charged therein only in the disjunctive with having "authorized, ordered, or done some or all of the acts constituting and in furtherance of the offense hereinafter charged" and are therefore not directly charged with having combined and conspired in violation of the Sherman Act; and the defendant, I. William Schimmel, hereby adopts and incorporates herein the "Motion to Dismiss Indictment" heretofore filed by defendants Milton S. Kronheim and Bernard Cohen.

John Henry Lewin, Attorney for Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE INDICTMENT AS TO CVA CORPORATION, A DISSOLVED MARYLAND CORPORATION—Filed November 30, 1955

Henrietta Auerbach, Jean A. Montenecourt, Paul I. Nederman, J. B. Popkin and Harry G. Serlis, being all of

[fol. 41] the Directors of CVA, a Maryland corporation, at the time of its dissolution, move the Court to dismiss the Indictment in this case and each Count thereof as to the said Defendant, CVA Corporation, and as grounds for said Motion say:

1. Said Defendant, CVA Corporation, incorporates in this Motion by reference and refiles as a part hereof the Motion to Dismiss filed on behalf of this Defendant as a dissolved Maryland corporation on June 27, 1955.

2. Said Defendant, pursuant to the approved Stipulation of the parties, incorporates in this paper by reference and adopts as its Motion to Dismiss the "Motion to Dismiss" heretofore filed in the case by the Defendants, Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel, filed on the 29th day of November, 1955.

Henrietta Auerbach, Jean A. Montenecourt, Paul I. Nederman, J. B. Popkin, Harry G. Serlis, By Markell, Veazey & Gans, /s/ Hilary W. Gans, Attorneys for CVA Corporation.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE INDICTMENT AS TO MELROSE DISTILLERS, INC., A DISSOLVED MARYLAND CORPORATION— Filed November 30, 1955

Seward W. Eric, Harry J. Greenwald, Lester J. Milich, Edward F. O'Brien, Milton B. Seasonwein, Kasper H. Seidel, being all of the Directors of Melrose Distillers, Inc., a Maryland corporation, at the time of its dissolution, move the Court to dismiss the Indictment in this case and each [fol. 42] count thereof as to the said Defendant, Melrose Distillers, Inc., and as grounds for said Motion say:

1. Said Defendant, Melrose Distillers, Inc., incorporates in this Motion by reference and refiles as a part hereof the Motion to Dismiss filed on behalf of this Defendant as a dissolved Maryland corporation on June 27, 1955.

2. Said Defendant, pursuant to the approved Stipulation of the parties, incorporates in this paper by reference and adopts as its Motion to Dismiss the "Motion to Dismiss" heretofore filed in the case by the Defendants, Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel filed on the 29th day of November, 1955.

Seward W. Eric, Harry J. Greenwald, Lester J. Milich, Edward F. O'Brien, Milton B. Seasonwein, Kasper H. Seidel, By Markwell, Veazey and Gans, /s/ Hilary W. Gans, Attorneys for Melrose Distillers, Inc.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE INDICTMENT AS TO DANT DISTILLERY AND DISTRIBUTING CORP., A DISSOLVED DELAWARE CORPORATION—Filed November 30, 1955

Harold Baum, Harold Morris and Edward B. Rohn, Jr., being all of the Directors of Dant Distillers and Distributing Corp., a Delaware corporation, at the time of its dissolution, move the Court to dismiss the Indictment in this case and each count thereof as to the said Defendant, Dant Distillery and Distributing Corp., and as grounds for said Motion say:

[fol. 43] 1. Said Defendant, Dant Distillery and Distributing Corp., incorporates in this Motion by reference and refiles as a part hereof the Motion to Dismiss filed on behalf of this Defendant as a dissolved Delaware corporation on June 27, 1955.

2. Said Defendant, pursuant to the approved Stipulation of the parties, incorporates in this paper by reference and adopts as its Motion to Dismiss the "Motion to Dismiss" heretofore filed in the case by the Defendants, Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel, filed on the 29th day of November, 1955.

Harold Baum, Harold Morris, Edward B. Rohn, Jr., By Markell, Veazey and Gans, /s/ Hilary W. Gans, Attorneys for Dant Distillery and Distributing Corp.

IN UNITED STATES DISTRICT COURT

OPINION—Filed January 10, 1956

Thomsen, Chief Judge:

The Indictment in this case charges two associations of retailers, one association of wholesalers, fourteen manufacturers, seven wholesalers, and thirty-one individuals connected with them, engaged in the alcoholic beverage industry, with violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. 1, 2.

Count One charges a conspiracy "to raise, fix, maintain, and stabilize the wholesale and retail prices of alcoholic beverages shipped into the State of Maryland from manufacturers located outside the State of Maryland" in restraint of trade and commerce and in violation of Section 1. The terms of the conspiracy are alleged to have been: (a) that fair trade prices be required to be established, and that [fol. 44] manufacturers and wholesalers be required to enforce the observance of said prices and sell only to retailers who comply; (b) that retailers be required, induced or compelled to observe and adhere to such fair trade prices; (c) that no alcoholic beverages be sold directly by a manufacturer to the Department of Liquor Control for Montgomery County or to the Liquor Control Boards of other monopoly counties, or be sold to said purchasers indirectly through a wholesaler at prices less than the wholesaler's resale prices; and (d) that manufacturers, wholesalers, and retailers boycott and refuse to deal with, and induce and compel others to boycott and refuse to deal with, those who do not establish, enforce, observe and adhere to those terms. Count Two charges a conspiracy to monopolize said trade and commerce, in violation of Section 2. The terms of this conspiracy are alleged to have been the same as those of the conspiracy alleged in Count One. Count Three charges an attempt to monopolize said trade and commerce, also in violation of Section 2.

The defendants have moved to dismiss Counts One and Two on the grounds: (1) that they are too vague, confusing and contradictory to charge any offense under the Sherman Act; (2) that the State of Maryland, following the Twenty-

first Amendment, has by statute and court decisions preempted the whole field of marketing alcoholic beverages in Maryland, that there is a conflict between the policy and terms of the Maryland law and the policy and terms of the Sherman Act; that the acts and conduct alléged to constitute the conspiracy in this case are permitted or at least not prohibited by the Maryand law, and implement the State policy; therefore they are not within the ambit of the Sherman Act, and any prosecution thereunder for such acts and conduct would be unconstitutional; and (3) that under the so-called "Rule of Reason" the alleged acts and conduct were justified by the circumstances, including all the applicable Federal and State laws and policies.[1]

[fol. 45] The defendants have also moved to dismiss Count Two on the ground that it does not allege a conspiracy to monopolize violative of Section 2 of the Sherman Act, or, in the alternative, that the government be required to elect between Count One and Count Two, and to dismiss one or the other on the ground that Count Two alleges no conspiracy different from the conspiracy alleged in Count One.

Certain individual defendants have filed separate motions to dismiss on the ground of vagueness, and separate motions to dismiss have been filed on behalf of three corporations which have been dissolved since the indictment.

Since the government has not yet supplied certain particulars of the offense charged in Count Three, the time for filing motions to dismiss that count has been extended.

The Indictment

Count One

I. *The Defendants.* Paragraphs 1 to 7 identify the defendants: twenty-four corporations, including two associa-

[1] The Miller-Tydings Act, 15 U. S. C. A. 1; the McGuire Act, 15 U. S. C. A. 45; the Robinson-Patman Act, 15 U. S. C. A. 13(a); the Maryland Fair Trade Act, Annotated Code of Maryland, 1951 Ed., Art. 83, sec. 102-110; the Maryland Unfair Sales Act, Annotated Code of Maryland, 1951 Ed., Art. 83, sec. 111-115; the Maryland Alcoholic Beverage Act, Annotated Code of Maryland, 1951 Ed., Art. 2B; the Sherman Act, 15 U. S. C. A. 1; The Clayton Act, 15 U. S. C. A. 12, et seq.; and the Federal Trade Commission Act, 15 U. S. C. A. 41, et seq.

tions of retailers, one association of wholesalers, fourteen manufacturers, seven wholesalers, and thirty-one individuals connected with the corporations.

II. *Definitions.* Paragraph 8 defines "alcoholic beverages" to exclude beer, ale, porter and stout, and defines "manufacturer" as a person who operates a plant within the United States for distilling, rectifying, blending, fermenting, or bottling any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States, or is a distributor of alcoholic beverages selling to a wholesaler for resale to a retailer.

[fol. 46] III. *Nature of Trade and Commerce Involved.* Paragraph 9 alleges that alcoholic beverages are marketed in the State of Maryland in a continuous flow of shipments from manufacturers located outside the State, through wholesalers and retailers, to the consuming public; that under the laws of the State, alcoholic beverages shipped and sold by manufacturers are sold through the Department of Liquor Control for Montgomery County, and Liquor Control Boards in other monopoly counties, and wholesalers licensed as such under the laws of Maryland to county dispensaries and other retailers.

Paragraph 10 makes the following allegations: Alcoholic beverages shipped and sold by manufacturers are customarily sold in Montgomery County to the Department, in conformity with the laws of the State. The Department sells alcoholic beverages through county liquor dispensaries to the consuming public. The Department of Liquor Control for Montgomery County, under the laws of the State of Maryland, has customarily purchased as a wholesaler alcoholic beverages direct from manufacturers. In the counties of Caroline, Dorchester, Harford, Kent, Somerset, Worcester, and Wicomico, in the State of Maryland, alcoholic beverages are sold, under the laws of the State, through county liquor dispensaries. Said counties, however, have customarily purchased alcoholic beverages from wholesalers licensed as such under the laws of Maryland, and said counties have not customarily operated as wholesalers. Said counties, including Montgomery County, are

monopoly counties. In all other counties in the State of Maryland in which alcoholic beverages are sold, such alcoholic beverages are shipped and sold by manufacturers to licensed wholesalers, who in turn sell to retailers licensed as such who sell to the consuming public. Said counties are open counties.

Paragraphs 11 and 12 allege that in 1954, 90% of the 6,235,971 wine gallons of alcoholic beverages sold by retailers in Maryland was produced outside the State; that about 5% of the total was sold through county dispensaries, mostly in Montgomery County; and that there were 32 [fol. 47] wholesalers and 8,783 retailers in Maryland, apart from boards and dispensaries in monopoly counties.

IV. *The Conspiracy.* Paragraph 13 alleges beginning about January, 1950, and continuously thereafter up to the date of the indictment, the defendant and other persons to the Grand Jurors unknown, "knowingly have entered into and engaged in an unlawful combination and conspiracy to raise, fix, maintain, and stabilize the wholesale and retail prices of alcoholic beverages shipped into the State of Maryland from manufacturers located outside the State of Maryland," in restraint of the aforesaid trade and commerce, and in violation of Section 1 of the Sherman Act.

Paragraph 14 alleges: "The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and others to the Grand Jurors unknown, the substantial terms of which have been and are:

"(a) That so-called 'fair-trade' prices for alcoholic beverages be required to be established, and that manufacturers and wholesalers be required to enforce the observance of said prices and sell alcoholic beverages only to those retailers who observe and adhere to said prices;

"(b) That retailers be required to observe and adhere to, or be induced and compelled to observe and adhere to, 'fair-trade' prices on alcoholic beverages established as aforesaid;

"(c) That no alcoholic beverages sold in the State of Maryland be sold directly by a manufacturer to the Department of Liquor Control for Montgomery County or the Liquor Control Boards of other monopoly counties, or be sold to said purchasers indirectly through a wholesaler at prices less than his customary resale prices; and

"(d) that manufacturers, wholesalers, and retailers shall boycott and refuse to deal with, those who do not establish, enforce, observe and adhere to the terms set out in subparagraphs (a), (b) and (c) above."

[fol. 48] Paragraph 15 alleges: "For the purpose of effectuating and carrying out the offense hereinabove described, the defendants, by agreement, understanding and concert of action, have done the things which, as hereinbefore alleged, they conspired and agreed to do."

V. *Effects.* Paragraph 16 alleges that the effects of the offense have been: (a) To raise, fix, maintain and stabilize the wholesale and retail prices of alcoholic beverages shipped in interstate commerce into the State of Maryland and sold and distributed therein; (b) To eliminate price competition among the defendant wholesalers and among retailers in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Maryland; (c) To eliminate price competition among defendant wholesalers and the other members of defendant wholesalers' association, and among members of defendant retailers' associations in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Maryland;[2] (d) To eliminate direct sales of alcoholic

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[2] Paragraphs 83 to 86 of the Bill of Particulars state:

"83 & 84. In explanation, paragraphs 16(b) and 16(c) of the indictment, allege that the effects of the offense are and have been: under paragraph 16(b), to eliminate price competition between each defendant wholesaler and other defendant wholesalers, individually and as a group; and, under paragraph 16(c), to eliminate price competition between defendant wholesalers, individually and as a group, and other wholesalers, individually and as a group, who are members of MWSD.

"85 & 86. In explanation, paragraphs 16(b) and 16(c) of the indictment allege that the effects of the offense are and have been:

beverages by manufacturers to monopoly counties acting as wholesalers; (e) To raise the wholesale and retail prices of alcoholic beverages in Montgomery County; (f) To require all interstate trade and commerce in alcoholic beverages to be channeled in the State of Maryland only through wholesalers; and (g) To restrain and suppress interstate [fol. 49] trade and commerce in alcoholic beverages not covered by fair trade contracts.

Paragraph 17 alleges: "It has never been and is not now the purpose, intent, or effect of said offense to promote the purpose of the Miller-Tydings Act amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) as amended, or of the McGuire Act (66 Stat. 631, July 14, 1952) or the Maryland Fair Trade Act, or to establish wholesale and retail prices on alcoholic beverages for the protection of the good will in the trade-marks, brands, or names of the manufacturers or wholesalers of such alcoholic beverages."

VI. *Jurisdiction and Venue.* Paragraph 18 alleges facts satisfying the requirements of jurisdiction and venue and of the applicable statute of limitations.

Count Two

Count Two realleges all of the allegations of paragraphs 1 through 12 and 14 through 18 of Count One. In place of paragraph 13 of Count One, it alleges that beginning about January, 1950, and continuously thereafter, the defendants, together with others to the Grand Jurors unknown, "have entered into and engaged in an unlawful combination and conspiracy to monopolize the interstate trade and commerce in alcoholic beverages previously described herein in violation of Section 2 of the * * * Sherman Act."

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under paragraph 16(b), to eliminate price competition between retailers, including each and all retailers in Maryland without regard to membership in any association; and under paragraph 16(c), to eliminate price competition between each and all retailers who is or are a member or members of MSLBA and/or MPLSA."

Count Three

Count Three is identical with Count Two except that it alleges "an attempt to monopolize the interstate trade and commerce in alcoholic beverages previously described herein in violation of Section 2 of the * * * Sherman Act," and that "in the aforesaid attempt to monopolize the defendants have done those things alleged in subparagraphs (a) through (d) of paragraph 14 of Count One."

* * * * * * *

[fol. 76]

V.

Motion To Dismiss As Against Dissolved Corporations

The indictment in this case was filed on April 6, 1955. On June 27, 1955, prior to arraignment, separate motions to dismiss the indictment as to Dant Distilling and Distributing Company, a Delaware corporation, and Melrose Distillers, Inc., and CVA Corporation, Maryland corporations, were filed by their respective directors on the ground that each of said corporations had been dissolved on May 2, 1955, by the filing of articles of dissolution in the state of its incorporation and by unanimous consent of all of its stockholders pursuant to the statutes of the state of its incorporation. An affidavit in support of said motions shows that each of these corporations was a wholly owned subsidiary of Schenley Industries, Inc., another defendant. Formal action with respect to the dissolution of the three corporations was approved at a meeting of the board of directors of Schenley Industries, Inc., on April 27, 1955. The Federal Trade Commission on September 24, 1952, had issued a complaint (Docket No. 6048) against Schenley Industries, Inc., and certain of its subsidiaries, including Melrose and CVA. Dant had not been organized at that time. Pursuant to stipulations, the Federal Trade Commission entered a cease and desist order on March 2, 1954. This order "created certain limitations on the operations of Schenley Industries, Inc., and its subsidiaries" which "made it necessary to arrange for the distribution in the

United States of all of the alcoholic beverages (except beer) through a single sales company". The name of Schenley Distributors, Inc., was changed to "Affiliated Distillers Brands Corp." on December 27, 1954, and it became the single selling company on January 1, 1955. Counsel for the company was directed to effectuate the dissolution [fol. 77] of Melrose, CVA and Dant. The affidavit states that their dissolution "was effectuated for the commercial and legal reasons above-mentioned, none of which had anything to do with the indictment" in the present case.

The first point to be decided is what law governs the question. This criminal proceeding is brought under a federal statute, and the question whether it can be prosecuted against a deceased person or a corporation which has ceased to exist must be determined by federal law. On the other hand, the question when corporate existence ends in the case of a corporation in dissolution or which has been dissolved depends on the law of the state of its creation. *Burnes Coal Corp. vs. Retail Coal Merchants Association,* (4 Cir.) 128 F. 2d 645.

> "We start with the firmly established premise that a dissolved corporation may thereafter be proceeded against either criminally or civilly only if authorized by the laws of the state of its incorporation. Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257, 259, 47 S. Ct. 391, 71 L. Ed. 634; Chicago Title and Trust Co. vs. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U. S. 120, 125, 58 S. Ct. 125, 82 L. Ed. 147; Defense Supplies Corp. vs. Lawrence Warehouse Co., 336 U. S. 631, 634-635, 69 S. Ct. 762, 93 L. Ed. 931. * * * " *United States vs. P. F. Collier & Son Corp.,* (7 Cir.) 208 F. 2d 936, at 937.

The contested issue; therefore, must turn upon the Delaware and Maryland statutes dealing with the dissolution of corporations. The controlling provision of the Delaware law is Section 42, Revised Code of Delaware, 1935, ch. 65, as amended in 1941, ch. 132, sec. 11, 8 Del. C., sec. 278. This section is entitled "Continuation of Corporation after Dissolution for Purposes of Suit, etc.", and provides as follows:

"All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the pur- [fol. 78] pose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only, for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees therein shall be fully executed."

Does the word "suits" as contained in the initial portion of this section, or the words "any action, suit, or proceeding" as contained in the proviso, encompass a criminal prosecution such as the instant case?

The exact question has been presented to the Court of Appeals of three Circuits. The Sixth and Tenth Circuits held that sufficient corporate life did not continue after dissolution to permit the prosecution of the criminal case. *U. S. vs. Line Material Co.*, (6 Cir.) 202 F. 2d 929; *U. S. Safeway Stores*, (10 Cir.) 140 F. 2d 834. The Seventh Circuit held the contrary. *U. S. vs. P. F. Collier & Son Corp.*, 208 F. 2d 936.[12] The decision of the Seventh Circuit was based in large part upon:

(1) The Federal Rules of Criminal Procedure. The Seventh Circuit said: "We agree that the word 'suit' or the

[12] See also In re Grand Jury Subpoenas Duces Tecum, (D. C. S. D. N. Y.) 72 F. Supp. 1013; U. S. vs. Cigarette Merchandisers Association, Inc., et al., (D. C. S. D. N. Y.) Nov. 23, 1955, Weinfeld, J., Civil No. 144-105.

word 'action' standing alone might reasonably be held as not including a criminal prosecution, but when the word [fol. 79] 'proceeding' is added we think a combination is presented which is well near inclusive of all forms of litigation. * * * Any doubt on this score is readily dispelled by reference to the Federal Rules of Criminal Procedure, 18 U. S. C. A. Rule 2 provides, 'These rules are intended to provide for the just determination of every criminal proceeding.' In scores of instances, a criminal prosecution is referred to as a 'proceeding'." The court cited paragraphs (a), (b) and (c) of Rule 21 as typical.

(2) The decision of the Fourth Circuit in *Bahen & Wright, Inc. vs. Commissioner*, 176 F. 2d 538, which construed the same Delaware statute as follows:

> "* * * The Delaware statute explicitly provides for continued corporate existence for as long as may be necessary to reach a final determination of any 'proceeding' as well as any 'action or suit' begun by or against a corporation within three years of its dissolution. The word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the statute."

(3) The decision of the Supreme Court in Delaware in *Addy vs. Short*, 89 A. 2d 136, wherein the court made some observations pertinent to the question at issue here. Referring to sec. 42, the Delaware court said:

> "During the three-year period of winding up, the corporation functions exactly as it had functioned before dissolution, with the important qualification that its powers are limited to closing its affairs and do not extend to carrying on the business for which it was established. But as concerns the property it had at the time of dissolution, its title and possession are unimpaired. Whatever rights it had, of whatever nature, are preserved in full vigor during the three-year period. Any other conclusion would contravene the plain language of the statute."

The Seventh Circuit, in *U. S. vs. P. F. Collier & Son Corp.*, supra, then said:

[fol. 80] "If, as the court stated, every right possessed by a corporation at the time of dissolution is preserved in full vigor during the three-year period, we see no reason why by the same token its liabilities, both civil and criminal, are not also preserved. Following the statement lastly quoted, the court further stated:

"'The suggestion that the act of dissolution in itself in some fashion works a forfeiture or extinguishment of a legal right, by analogy to the death of an individual, is therefore on the face of the statute unsound.'

"Again if dissolution by reason of the statute works no extinguishment of a legal right, we discern no reason why it works an extinguishment of a legal liability, whether civil or criminal."

This decision is in line with principles announced by the Fourth Circuit in analogous cases. In *Barnes Coal Corp. vs. Retail Coal Merchants Association*, (4 Cir.) 128 F. 2d 645, a triple damage suit under 15 U. S. C. A. sec. 15, the Court, speaking through Chief Judge Parker, said:

"On the second question, we entertain no doubt as to the survivability of the cause of action when the statute creating it is interpreted in the light of the common law rule relating to survival. While there might be some doubt as to this were we to look only to the ancient decisions, we think that the rule is to be determined, not merely by a consideration of the state of the common law at the time of the enactment of the statute de bonis asportatis in the reign of Edward III, or even by a consideration of the common law rule at the time of the American Revolution, but in the light of its subsequent development and the decisions interpreting it. It must be remembered, in this connection, that the common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. * * *" 128 F. 2d at 648.

[fol. 81] Business corporations such as are involved in this case did not even exist at common law. Moreover, at common law, criminal proceedings did not lie against such corporations as did exist. Finally, dissolution at common law was equated to civil death, with total extinction of corporate existence, upon which even the corporate realty reverted to the donors thereof, the corporate personalty escheated to the State, and debts either to or from the corporation were extinguished. 1 Blackstone, *Commentaries*, 467-485.

The corporate dissolution provided for by today's statute law is an entirely different conception, and one which requires continued corporate life. This principle is recognized and embodied in the Delaware statute, of which Judge Soper said: "Statutes of this type are broadly remedial." 176 F. 2d at 539.

The principle is also recognized and embodied in the Maryland statute which is applicable to defendants Melrose Distillers, Inc., and CVA Corporation. Art. 23, sec. 72 of the Maryland Code contains the following provision:

> "(b) The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation *shall continue in existence* for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs." (emphasis supplied).

Sec. 78(a) of Art. 23 provides:

> "The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs."

[fol. 82] In *Diamond Match Co. vs. State Tax Commission*, 175 Md. 234, a tax case, the Court of Appeals of Maryland referred to the dissolution statutes as follows:

> "The provisions are broad, and intended to cover every liability, although of an undetermined amount, and embrace the potential obligation contingent upon a liability to pay taxes subsequently levied by statute upon an assessable basis of a precedent date."

I conclude that under the applicable Delaware and Maryland statutes, the corporate existence of the dissolved corporations continues to a sufficient extent to permit the prosecution of this criminal proceeding.

IN UNITED STATES DISTRICT COURT

ORDER OF COURT ON MOTIONS—Filed January 30, 1956

This case coming on to be heard upon (1) the Motion of the Defendants Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel, to dismiss the first and second counts of the Indictment upon various grounds, (2) the Motion of various other Defendants adopting the same or parts thereof, (3) the Motion of Milton S. Kronheim and Bernard Cohen to dismiss the Indictment for failure to charge an offense against individual Defendants as required by Rule 7(c) of the Federal Rules of Criminal Procedure, (4) the Motions of various other Defendants adopting the same, and (5) the Motion of the Defendants, Dant Distilling and Distributing Company, Melrose Distillers, Inc., and C.V.A. Corporation to dismiss the Indictment as to them on the grounds of their dissolution as corporations, counsel for the parties were heard and the proceedings read and considered.

It is thereupon, this 30th day of January, 1956, for the reasons set forth in the Court's Opinion filed herein on the 16th day of January, 1956, by the United States District Court for the District of Maryland,

[fol. 83] Ordered:

1. That the United States of America be and it is hereby directed to file with the Clerk of this Court, on or before the 10th day of February, 1956, its election whether it will proceed to trial under Count One or Count Two of the Indictment and that one of the said Counts not so elected be thereupon dismissed;

2. That all other of the said Motions to Dismiss be and they are hereby denied, without prejudice, however, to the right of the Defendants, or any of them, to renew and raise for reconsideration at the trial the counts constituting the grounds of the said Motions set forth in Paragraphs Two and Three of Section A of the Motion to Dismiss filed on behalf of the Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel;

3. That this order is without prejudice to the right of the Defendants, or any of them, to file before trial motions to dismiss the Indictment, or any Count thereof, (including renewal of the present motions, hereby denied, or any of them, if warranted by further particulars filed subsequent to the original Motions) within ten days from the time of the last furnishing of particulars by the Government as ordered or permitted by this Court.

/s/ Roszel C. Thomsen, Chief Judge, United States District Court.

[fol. 88]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO REQUIRE ELECTION OF COUNTS—Filed February 15, 1956

The Defendants, Schenley, Industries, Inc., Schenley Distributors, Inc., Melrose Distillers, Inc., Dant Distilling and Distributing Company, CVA Corporation, Ralph T. Heymsfeld, Murrel J. Ades, Newton Kook and Max Sager, by their attorney, move the Court, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, (a) to dismiss Count Three of the Indictment, and (b) in the alternative, to re-

quire the Government to elect either Count One, Count Two or Count Three of the Indictment and to dismiss Count Three if not elected.

These Defendants, pursuant to the approved Stipulation of the parties, incorporate in this paper by reference and adopt as their grounds for the above Motion the grounds set forth in the Motion filed by the Defendants, Maryland Institute of Wine and Spirit Distributors, Inc., and I. Wm. Schimmel, on the 10th day of February, 1956.

Hilary W. Gans, Attorney for Schenley Industries, Inc., Schenley Distributors, Inc., Melrose Distillers, Inc., Dant Distilling and Distributing Company, CVA Corporation, Ralph T. Heymfeld, Murrel J. Ades, Newton Kook and Max Sager.

In United States District Court

Order Denying Motion

The Defendants, Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel, having on January 30, 1956 filed a "Motion to Dismiss or in the alternative to require election of counts", various other Defendants having thereafter adopted the same motion or part [fol. 89] thereof, and the Court having considered the motions and grounds stated therein, it is:

Ordered: that the Motion of the Defendants, Maryland Institute of Wine and Spirit Distributors, Inc., and I. William Schimmel to dismiss or in the alternative to require election of counts, filed January 30, 1956 and the Motions of the other Defendants, adopting the same or parts thereof, be and they are hereby dismissed without prejudice; however, to the right of the Defendants or any of them renew the Motions hereby dismissed at any appropriate time hereafter.

/s/ Rozel C. Thomsen, Chief Judge.

Filed June 13, 1957.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 23212 Criminal—Indictment for Vio. U. S. C. Title 15, Secs. 1 and 2, as amended.

UNITED STATES OF AMERICA,

v.

MELROSE DISTILLERS, INC.

JUDGMENT—January 6, 1958

On this 6th day of January, 1958 came the attorney for the government and the defendant appeared "by counsel".

It Is Adjudged that the defendant has been convicted upon its plea of Nolo Contendere, which was accepted by the Court, of the offense of (Counts Nos. 1, 2 and 3) Conspiracy in restraint of trade and commerce in Alcoholic Beverages, etc., and the court having asked the defendant [fol. 90] whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of Five Thousand Dollars ($5,000.00) on the 1st count of the Indictment, imposition of sentence suspended as to the 2nd and 3rd counts of the Indictment, and to pay its proportionate share of the costs.

Roszel C. Tomsen, Chief Judge, United States District Court.

In United States District Court for the District of Maryland

No. 23212 Criminal—Indictment for Vio. U. S. C. Title 15, Secs. 1 and 2, as amended.

United States of America,

v.

Dant Distilling & Distributing Co.

Judgment—January 6, 1958

On this 6th day of January, 1958 came the attorney for the government and the defendant appeared "by counsel".

It Is Adjudged that the defendant has been convicted upon its plea of Nolo Contendere, which was accepted by the Court, of the offense of (Counts Nos. 1, 2 and 3) Conspiracy in restraint of trade and commerce in Alcoholic Beverages, etc., and the court having asked the defendant [fol. 91] whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of Five Thousand Dollars ($5,000.00) on the 1st count of the Indictment, imposition of sentence suspended as to the 2nd count of the Indictment, and to pay a fine of Twenty-Five Hundred Dollars ($2,500.00) on the 3rd count of the Indictment, fines to be cumulative, making a total fine of Seventy-Five Hundred Dollars ($7,500.00), and to pay its proportionate share of the costs.

Roszel C. Thomsen, Chief Judge, United States District Court.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 23212 Criminal—Indictment for Vio. U. S. C. Title 15, Secs. 1 and 2, as amended.

UNITED STATES OF AMERICA,

v.

CVA CORPORATION

JUDGMENT—January 6, 1958

On this 6th day of January, 1958 came the attorney for the government and the defendant appeared "by counsel".

It Is Adjudged that the defendant has been convicted upon its plea of Nolo Contendere, which was accepted by [fol. 92] the Court, of the offense of (Counts Nos. 1, 2 and 3) Conspiracy in restraint of trade and commeree in Alcoholic Beverages, etc., and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of Five Thousand Dollars ($5,000.00) on the 1st count of the Indictment, imposition of sentence suspended as to the 2nd count of the Indictment and to pay a fine of One Thousand Dollars ($1,000.00) on the 3rd count of the Indictment, fines to be cumulative, making a total fine of Six Thousand Dollars ($6,000.00), and to pay its proportionate share of the costs.

Rozel C. Thomsen, Chief Judge, United States District Court.

[fol. 101]

IN UNITED STATES DISTRICT COURT

EXCERPTS

ANNOTATED CODE OF MARYLAND 1951 EDITION AS AMENDED

* * * * * * *

[fol. 104]

ARTICLE 23—CORPORATIONS

Section 72. (Procedure for Voluntary Dissolution.)

* * * * * * *

(b) The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs.

* * * * * * *

Section 78. (Effect of Dissolution.) (a) The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of par-
[fol. 105] ties, if any, as the court directs. No receiver shall institute suit except by order of the court appointing him; and such suit may be brought in his own name as receiver or, notwithstanding its dissolution, in the name of the corporation, to his use.

EXCERPTS FROM ACTS OF GENERAL ASSEMBLY OF MARYLAND

1957 SESSION—CHAPTER 399

An Act * * * to repeal and re-enact with amendments, Section 78 of Article 23 of the Annotated Code of Maryland (1951 Edition), title "Corporations", sub-title "Dissolution".

* * * * * * *

Sec. 11. *And be it further enacted by the General Assembly of Maryland*, That Section 78 of Article 23 of the Annotated Code of Maryland (1951 Edition), title "Corporations", sub-title "Dissolution" * * * be and they are hereby repealed and reenacted, with amendments, to read as follows:

78. (Effect of Dissolution) (a) The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; [nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. No receiver shall institute suit except by order of the court appointing him; and such suit may be brought in his own name as receiver or, notwithstanding its dissolution, in the name of the corporation, to his use].

* * * * * * *

Sec. 44. *And be it further enacted by the General Assembly of Maryland*, That this Act shall take effect June 1, 1957. Approved March 28, 1957.

Explanation: [Brackets] indicate matter stricken from existing law.

[fol. 107]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 23212

* [Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS

Filed—Jan. 21, 1958—R. M. F. Williams, Jr., Clerk

Name and address of Appellant: Melrose Distillers, Inc., Empire State Building, New York 1, N. Y.

Name and address of Appellant's Attorney: Hilary W. Gans, 1904 First National Bank Building, Baltimore 2, Maryland.

Offense: In Count One conspiracy to restrain, in Count Two conspiracy to monopolize, and in Count Three attempt to monopolize interstate trade and commerce in alcoholic beverages in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 1, 2, commonly known as the Sherman Act.

Judgment appealed from: The indictment was returned April 6, 1955. On June 27, 1955, a motion was filed on behalf of this defendant, Melrose Distillers, Inc., to dismiss the indictment on the ground that on May 2, 1955, it had been dissolved as a corporation. On January 10, 1956, the District Court overruled this defendant's motion to dismiss the indictment. The defendant then pleaded not guilty.

On January 6, 1958, by leave of court the defendant withdrew its plea of not guilty and pleaded nolo contendere which was accepted by the District Court. The judgment of the District Court, dated January 6, 1958, was that the defendant Melrose Distillers, Inc. pay a fine of Five Thousand Dollars ($5,000.00) on the First Count of the indictment; that imposition of sentence be suspended as to the Second and Third Counts of the indictment, and that the defendant pay its proportionate share of the costs.

Melrose Distillers, Inc. hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the above stated judgment.

Dated January 16, 1958.

Hilary W. Gans, Attorney for Appellant.

Copy mailed to Leon H. A. Pierson, Esquire, United States Attorney, P. O. Building, Baltimore 2, Maryland, on January 16, 1958.

Hilary W. Gans

[fol. 108]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. 23212 Criminal

UNITED STATES OF AMERICA,

vs.

MELROSE DISTILLERS, INC.

STATEMENT OF DOCKET ENTRIES

Filed—Jan. 21, 1958—R. M. F. Williams, Jr., Clerk

1. Indictment for Vio. U.S.C., Title 15, Secs. 1 and 2, as amended, (Conspiracy in restraint of trade and commerce in Alcoholic Beverages, etc.) filed April 6, 1955.
2. Arraignment, January 6, 1958.
3. Plea entered to Indictment, "Nolo Contendere" which was accepted by the Court on January 6, 1958.
4. Judgment: That the defendant pay a fine of Five Thousand Dollars ($5,000.00) on the 1st count of the Indictment, imposition of sentence suspended as to the 2nd and 3rd counts of the Indictment, and to pay its proportionate share of the costs.
5. Notice of Appeal filed, January 16, 1958.
6. Dated: January 17, 1958.

Wilfred W. Butschky, Clerk, by Arthur J. Robertson, Chief Deputy Clerk.

[fol. 109]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 23212

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS

Filed—Jan. 21, 1958—R. M. F. Williams, Jr., Clerk

Name and address of Appellant: C V A Corporation, Empire State Building, New York 1, N. Y.

Name and address of Appellant's Attorney: Hilary W. Gans, 1904 First National Bank Building, Baltimore 2, Maryland.

Offense: In Count One conspiracy to restrain, in Count Two conspiracy to monopolize, and in Count Three attempt to monopolize interstate trade and commerce in alcoholic beverages in violation of Sections 1 and 2 of the act of Congress of July 2, 1890, 26 Stat. 209, as amended, 18 U.S.C. 1, 2, commonly known as the Sherman Act.

Judgment appealed from: The indictment was returned April 6, 1955. On June 27, 1955, a motion was filed on behalf of this defendant, C V A Corporation, to dismiss the indictment on the ground that on May 2, 1955, it had been dissolved as a corporation. On January 10, 1956, the District Court overruled this defendant's motion to dismiss the indictment. The defendant then pleaded not guilty.

On January 6, 1958, by leave of court, the defendant withdrew its plea of not guilty and pleaded nolo contendere which was accepted by the District Court. The judgment of the District Court, dated January 6, 1958, was that the defendant, C V A Corporation, pay a fine of Five Thousand Dollars ($5,000.00) on the First Count of the indictment; that imposition of sentence be suspended as to the Second Count of the indictment, and that the defendant pay a fine of One Thousand Dollars

($1,000.00) on the Third Count of the indictment, such fines to be cumulative, making a total fine of Six Thousand Dollars ($6,000.00), and that the defendant pay its proportionate share of the costs.

C V A Corporation hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the above stated judgment.

Dated January 16, 1958.

Hilary W. Gans, Attorney for Appellant.

Copy mailed to Leon H. A. Pierson, Esquire, United States Attorney, P. O. Building, Baltimore 2, Maryland, on January 16, 1958.

Hilary W. Gans

[fol. 110]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. 23212 Criminal

UNITED STATES OF AMERICA,

vs.

CVA CORPORATION.

STATEMENT OF DOCKET ENTRIES

Filed Jan. 21, 1958—R. M. F. Williams, Jr., Clerk

1. Indictment for Vio. U.S.C., Title 15, Secs. 1 and 2, as amended, (Conspiracy in restraint of trade and commerce in Alcoholic Beverages, etc.) filed April 6, 1955.
2. Arraignment, January 6, 1958.
3. Plea entered to Indictment, "Nolo Contendere" which was accepted by the Court on January 6, 1958.
4. Judgment: That the defendant pay a fine of Five Thousand Dollars ($5,000.00) on the 1st count of the

Indictment, imposition of sentence suspended as to the 2nd count of the Indictment and to pay a fine of One Thousand Dollars ($1,000.00) on the 3rd count of the Indictment, fines to be cumulative, making a total fine of Six Thousand Dollars ($6,000.00), and to pay its proportionate share of the costs.

5. Notice of Appeal filed, January 16, 1958.

6. Dated: January 17, 1958.

Attested:

Wilfred W. Butschky, Clerk, by Arthur J. Robertson, Chief Deputy Clerk.

[fol. 111]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 23212

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS

Filed—Jan. 21, 1958—R. M. F. Williams, Jr., Clerk

Name and address of Appellant: Dant Distillery and Distributing Corporation, Empire State Building, New York 1, N. Y.

Name and address of Appellant's Attorney: Hilary W. Gans, 1904 First National Bank Building, Baltimore 2, Maryland.

Offense: In Count One conspiracy to restrain, in Count Two conspiracy to monopolize, and in Count Three attempt to monopolize interstate trade and commerce in alcoholic beverages in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 1, 2, commonly known as the Sherman Act.

Judgment appealed from: The indictment was returned April 6, 1955. On June 27, 1955, a motion was filed on

behalf of this defendant, Dant Distillery and Distributing Corporation, to dismiss the indictment on the ground that on May 2, 1955, it had been dissolved as a corporation. On January 10, 1956, the District Court overruled this defendant's motion to dismiss the indictment. The defendant then pleaded not guilty.

On January 6, 1958, by leave of court, the defendant withdrew its plea of not guilty and pleaded nolo contendere which was accepted by the District Court. The judgment of the District Court, dated January 6, 1958, was that the defendant Dant Distillery and Distributing Corporation pay a fine of Five Thousand Dollars ($5,000.00) on the First Count of the indictment; that imposition of sentence be suspended as to the Second Count of the indictment, and that the defendant pay a fine of Twenty-five Hundred Dollars ($2500.00) on the Third Count of the indictment, such fines to be cumulative, making a total fine of Seventy-five Hundred Dollars ($7500.00), and that the defendant pay its proportionate share of the costs.

Dant Distillery and Distributing Corporation hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the above stated judgment.

Dated January 16, 1958.

Hilary W. Gans, Attorney for Appellant.

Copy mailed to Leon H. A. Pierson, Esquire, United States Attorney, P. O. Building, Baltimore 2, Maryland, on January 16, 1958.

Hilary W. Gans

[fol. 112]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. 23212 Criminal

UNITED STATES OF AMERICA,

vs.

DANT DISTILLERY AND DISTRIBUTING CORPORATION.

STATEMENT OF DOCKET ENTRIES

Filed—Jan. 21, 1958—R. M. F. Williams, Jr., Clerk

1. Indictment for Vio. U.S.C., Title 15, Secs. 1 and 2, as amended, (Conspiracy in restraint of trade and commerce in Alcoholic Beverages, etc.) filed April 6, 1955.
2. Arraignment, January 6, 1958.
3. Plea entered to Indictment, "Nolo Contendere" which was accepted by the Court on January 6, 1958.
4. Judgment: That the defendant pay a fine of Five Thousand Dollars ($5,000.00) on the 1st count of the Indictment, imposition of sentence suspended as to the 2nd count of the Indictment, and to pay a fine of Twenty-Five Hundred Dollars ($2,500.00) on the 3rd count of the Indictment, fines to be cumulative, making a total fine of Seventy-Five Hundred Dollars ($7,500.00), and to pay its proportionate share of the costs.
5. Notice of Appeal filed, January 16, 1958.
6. Dated: January 17, 1958.

Wilfred W. Butschky, Clerk, by Arthur J. Robertson, Chief Deputy Clerk.

[fol. 113]

IN UNITED STATES COURT OF APPEALS

January 21, 1958, appearance of Hilary W. Gans entered for the appellants.

January 21, 1958, appearance of Leon H. A. Pierson, United States Attorney, entered for the appellee.

January 30, 1958, appearance of Wilford L. Whitley, Jr., Attorney, Department of Justice, entered for the appellee.

April 10, 1958, record on appeal filed.

May 1, 1958, brief and appendix for appellants filed.

May 21, 1958, motion of appellee for permission to file brief in excess of fifty pages filed.

ORDER GRANTING SPECIAL PERMISSION TO APPELLEE TO FILE BRIEF IN EXCESS OF FIFTY PRINTED PAGES—
Filed May 24, 1958

Upon the motion of the appellee, by its counsel, and for good cause shown,

Special permission is hereby granted the appellee in the above entitled case to file a brief in excess of 50 printed pages but not exceeding 61 printed pages.

May 23, 1958.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

May 26, 1958, brief of appellee filed.

May 29, 1958, reply brief for appellants filed.

June 4, 1958, appearance of Robert S. Marx entered for the appellants.

June 4, 1958, appearance of John C. Fricano, Attorney, [fol. 114] Department of Justice, entered for the appellee.

* * * * * * *

Minute entry of Argument and Submission—June 4, 1958 (omitted in printing).

[fol. 115]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7608.

MELROSE DISTILLERS, INC., C V A CORPORATION, and DANT DISTILLERY AND DISTRIBUTING CORPORATION, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore

---

Argued June 4, 1958.

Before SOPER and HAYNSWORTH, Circuit Judges, and MOORE, District Judge.

Robert S. Marx (Roy G. Holmes; Hilary W. Gans; Markell, Veazey & Gans, and Nichols, Wood, Marx & Ginter on brief) for Appellants, and Wilford L. Whitley, Jr., Attorney, Department of Justice, (Victor R. Hansen, Assistant Attorney General; George H. Schueller, Attorney, Department of Justice, and Leon H. A. Pierson, United States Attorney, on brief) for Appellee.

[fol. 116] OPINION—Decided August 29, 1958

MOORE, District Judge:

Appellants Melrose Distillers, Inc., and C V A Corporation are dissolved Maryland corporations. Appellant Dant Distillery and Distributing Corporation is a dissolved Delaware corporation. They were convicted along with numerous other defendants not involved here on their plea of nolo contendere to a three count indictment charging conspiracy to fix wholesale and retail prices of alcoholic beverages shipped into the State of Maryland by outside manufacturers, and to monopolize and attempt to monopolize interstate trade and commerce there in violation of Sections

1 and 2 of the Sherman Act. The indictment was returned on April 6, 1955. The corporations were all dissolved on May 2, 1955. The plea of nolo contendere was filed on January 6, 1958. Prior to their pleas of nolo contendere, appellants had pleaded not guilty and had moved to dismiss the indictment on the grounds, so far as pertinent here, (1) that each of them had been dissolved prior to the plea of nolo contendere, and (2) that the alleged acts and conduct of defendants charged in the indictment "were permitted, sanctioned, and encouraged" by the announced governmental policy and law of the State of Maryland.

The questions involved in appellants' motions in the District Court to dismiss the indictment survive the plea of nolo contendere. *Universal Milk Bottle Service* v. *United States,* 6 Cir., 188 F.2d 959. Hence, appellants would be entitled to a reversal of their conviction notwithstanding the plea of nolo contendere should their contentions regarding the indictment be sustained on this appeal.

The law of Delaware providing for the survival for certain purposes of dissolved corporations (Section 278 of the [fol. 117] General Corporation Law of the State of Delaware, (8) Del. C. §278) reads as follows:

> "All Corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued

bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."

Corresponding provisions of the law of Maryland are:

"The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate [fol. 118] and wind up its business and affairs." Section 72(b) Article 23 of the Annotated Code of Maryland (1951) [now Section 76(b)] and

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed upon them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs . . ." Section 78(a) iden.

Appellants argue that both the Delaware and the Maryland statutes should be interpreted to mean that a dissolved corporation survives its dissolution only for the purpose of winding up its civil affairs and discharging its civil obligations; but that no criminal charges which have not been disposed of by imposition of a fine or penalty survive the dissolution of the corporations. Stated more clearly, the argument is that insofar as pending criminal proceedings are concerned, the dissolution of a corporation is equivalent to the death of a natural person and that unless the legislature of the state of the corporation's birth shall have specifically provided otherwise (as they contend neither Delaware nor Maryland has done) a pending criminal proceeding can go no farther. We think this contention is based upon a strained and artificial interpretation of the statutory language. There may be situations in which a

precise and restrictive meaning should be given to the words "action, suit or proceeding" as used in the Delaware statute and the words "suit or proceeding" as used in the Maryland statute. However, the application of these words where the question involves the abatement or survival of [fol. 119] criminal prosecutions pending against corporations does not present such a situation. To give them the construction for which appellants contend would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequences of their criminal acts by the simple process of voluntary dissolution.

That there is a division of authority on this question can not be denied. The Tenth Circuit in the case of *United States* v. *Safeway Stores, Inc.*, 10 Cir., 140 F.2d 834, in considering the same Delaware statute involved here, concluded that the word "suits" does not include a criminal prosecution. It is to be noted, however, that the Court in that case did not even consider, much less interpret, the broader term "proceedings," appearing in the same statute. Moreover, the corporations involved there had been dissolved prior to indictment, and therefore there was no "pending" proceeding.

In the later case of *United States* v. *United States Vanadium Corporation*, 10 Cir., 230 F.2d 646, decided by a different panel of judges of the Tenth Circuit, that Court, while adhering to the doctrine of the *Safeway* case, said that the panel of judges who decided the *Vanadium* case were not "in full sympathy with the law as declared in the *Safeway* case," and strongly intimated that were it not for their feeling "that one panel of the Court should not lightly overrule a decision by another panel" they would have arrived at a different conclusion.

In *United States* v. *Line Material Company*, 6 Cir., 202 F.2d 929, the Court of Appeals for the Sixth Circuit, construing this same Delaware statute, held that the words [fol. 120] "action, suit or proceeding" did not embrace a criminal prosecution.

On the other hand, the Court of Appeals for the Seventh Circuit, in the case of *United States* v. *P. F. Collier & Son*

Corporation, 7 Cir., 208 F.2d 936, reached exactly the opposite conclusion. The reasoning of that Court was as follows:

> "We have read and reread defendants' argument, as well as the many cases cited in support of the order appealed from, but we are unable to escape what we think is the plain, unambiguous terminology contained in the Delaware statute. The words 'any action, suit, or proceeding' in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty. The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on the legislative intent. If, however, the legislature had intended to embrace only civil litigation, it could easily have done so by the addition of a single word, 'civil,' and could have provided for 'any civil action, suit or proceeding.' Or if it had intended to exclude a criminal prosecution from the broad and inclusive language which it employed, it could readily have done so by providing, 'any action, suit or proceeding other than a criminal prosecution.' And while it may be an immaterial observation, no sound reason occurs why a legislature would intend to relieve a dissolved corporation of its criminal liability and at the same time preserve its civil liability. A corporation cannot be sent to jail; the discharge of its liability whether criminal or civil can only be effected by the payment of money."

[fol. 121] In our view the *Collier* case correctly interprets and applies the words of the Delaware statute. We have held in a tax case, construing the very Delaware statute involved here that "[T]he word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the statute." *Bahen & Wright, Inc.* v. *Commissioner of Internal Revenue*, 4 Cir., 176 F.2d 538. See also *United States* v. *Maryland and Virginia Milk Producers, Inc.*, 145 F.Supp. 374 (D.C. Dist. Col.).

We find the Maryland statute to be, in all its essentials, of like effect to that of Delaware. We conclude therefore that under the applicable statutes, both of Delaware and Maryland, the dissolution of appellant corporations did not extinguish their liability in pending criminal proceedings against them.

Appellants' motion in the District Court to dismiss Counts 1 and 2 of the indictment on the ground that the alleged acts and conduct of defendants charged therein "were permitted, sanctioned, and encouraged" by the announced governmental policy and law of the State of Maryland was without merit, and was properly overruled.

Two Maryland Statutes were cited in support of this motion. One was the Maryland Alcoholic Beverages Law; the other the Maryland Fair Trade Law. The pertinent portions of the Alcoholic Beverages Law merely provide against discrimination by manufacturers and wholesalers in price, discounts, or quality of merchandise between one customer and another; and further that the Comptroller of the Treasury shall prescribe maximum discounts and require manufacturers and wholesalers to file a schedule of [fol. 122] their prices to their customers, and to file with the Comptroller any proposed price change, which change, if a reduction in price, is to be postponed for a period of time prescribed by the Comptroller sufficient to permit notice to other manufacturers or wholesalers selling similar wines or liquors and an opportunity for them to make a like price decrease. Obviously, this system of regulation preserves free and open competition among retailers, and could not by any stretch of the imagination be denominated "horizontal" price fixing.

The Fair Trade Law of Maryland, as do most such State Fair Trade Laws, merely permits manufacturers and wholesalers of trade-marked goods which are in free and open competition with other goods of the same class to fix the retail price of these goods for the purpose of protecting the trade mark. Neither the Maryland Fair Trade Law nor the Maryland Alcoholic Beverages Law affords protection against prosecution for a conspiracy to fix prices "horizontally" or a conspiracy to monopolize trade or an attempt to do so.

The indictment in count one charged a conspiracy to bring about "horizontal" price fixing; in count two it charged a conspiracy to monopolize interstate trade and commerce in alcoholic beverages, and in count three it charged an attempt to monopolize such trade and commerce. None of these acts is in any way permitted, sanctioned, or encouraged by the announced governmental policy and law of the State of Maryland.

It follows from what has been said that the judgment of the District Court is *Affirmed*.

[fol. 123]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7608

MELROSE DISTILLERS, INC., C V A CORPORATION, and DANT DISTILLERY AND DISTRIBUTING CORPORATION, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeals From the United States District Court for the District of Maryland

---

JUDGMENT ENTERED August 29, 1958

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from, in this cause, be, and the same are hereby, affirmed.

Morris A. Soper, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.
Ben Moore, United States District Judge.

[fol. 124] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 125]

SUPREME COURT OF THE UNITED STATES

No. 404, October Term, 1958

MELROSE DISTILLERS, INC., CVA CORPORATION and DANT DISTILLERY and DISTRIBUTING CORPORATION, Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—November 10, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted limited to question No. 1 presented by the petition for the writ which reads as follows:

"1. Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?"

The case is transferred to the summary calendar. The Attorneys General of the States of Maryland and Delaware are invited to file briefs, as amici curiae, in this case if they are so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 404

MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT S. MARX,
ROY G. HOLMES,
900 Tri-State Building,
Cincinnati 2, Ohio,
HILARY W. GANS,
1904 First National Bank Building,
Baltimore 2, Maryland,
Counsel for Petitioners.

Of Counsel:

NICHOLS, WOOD, MARX & GINTER,
900 Tri-State Building,
Cincinnati 2, Ohio,
MARKELL, VEAZEY & GANS,
1904 First National Bank Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ------

MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 29, 1958 affirming a judgment of the United States District Court for the District of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported as yet and is printed, together with the judgment of the Court, as Appendix A. hereto.

The opinion of the District Court is reported in 138 F. Supp. 685 (D. C. Md. 1956) and is printed on pages 43-82 of the record as printed for use of the Court of Appeals[1] (nine copies of which record are filed herewith).

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1958. The jurisdiction of this Court is invoked under Sec. 1254(1), Title 28 U. S. C. A. (App. B.).

QUESTIONS PRESENTED

On April 6, 1955, the petitioners, who were, respectively, two Maryland corporations and a Delaware corporation, and subsidiaries of Schenley Industries, Inc., a Delaware corporation, were indicted in three counts, along with their corporate parent and some fifty-one other defendants, for alleged violations of Sections 1 and 2 of the Sherman Act (Sections 1 and 2, Title 15 U. S. C. A.) with respect to alcoholic beverages shipped into Maryland (R. 1-14).

On May 2, 1955, each of said petitioners was duly dissolved under the laws of the State of its creation for commercial and legal reasons having nothing to do with the indictment (R. 21, 25, 32). On June 27, 1955, motions to dismiss as to these three petitioners (because of their dissolutions) were filed on their behalf (R. 16, 27, 23) which were later carried forward into other motions (filed Nov. 30, 1955) to dismiss the indictment on the ground (among others not here pertinent) that it stated no offense in view of the laws of Maryland regulating alcoholic beverages in that State under the Twenty-First Amendment (R. 40-43).

On January 10, 1956 the District Court denied the motions and some two years later on January 6, 1958 adjudged

[1] Reference thereto will be indicated thus: (R.).

the petitioners (among others) guilty upon pleas of "nolo contendere" and sentenced them to fines aggregating $18,500 (R. 89-92). The Court of Appeals affirmed (App. A.). The questions raised by the motions (which the Court of Appeals held to have survived the pleas nolo) and presented by this petition are:

1. Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?

2. Did the indictment in this case state an indictable offense in view of the comprehensive laws of Maryland regulating the sale, traffic and control of alcoholic beverages in that state?

CONSTITUTION AND STATUTES INVOLVED

The pertinent portions of Section 278 Delaware General Corporation Law; Sections 72(b) (now 76(b)), 74 (now 78) and 78(a) (now 82(a)), Article 23, Ann. Code of Maryland 1951; Sections 1, 105 (now 109), 105(e) (now 109(e)), Article 2B, Ann. Code of Maryland 1951; Section 1254(1) Title 28 U. S. C. A.; Sections 1 and 2 of the Sherman Act (Sections 1 and 2 Title 15 U. S. C. A.) and Section 2 of the Twenty-first Amendment to the Constitution of the United States, are set forth in the Appendix B. hereto.

STATEMENT

An indictment (R. 1-14) covering the period from January 1950 to the date of its return was returned in the District Court on April 6, 1955 against 24 corporate, and 31 individual defendants. The 24 corporate defendants included 14 "defendant manufacturers" among which were

the three petitioners herein as well as their parent corporation, Schenley Industries, Inc., a Delaware corporation, of which they were wholly owned subsidiaries.

Among the 31 individual defendants was an officer of each of the petitioners described as having been actively engaged in its management, direction or operation and as having authorized, ordered or done some or all of the things complained of (R. 3, 5-6).

The petitioners, Melrose Distillers, Inc. and CVA Corporation, were Maryland corporations while petitioner, Dant Distillery and Distributing Corporation, was a Delaware corporation.

The indictment charged violation of Sections 1 and 2 of the Sherman Act (Sections 1 and 2 Title 15, U. S. C. A.) in three counts as follows:

First: That the defendants knowingly combined and conspired to raise, fix, maintain and stabilize wholesale and retail prices of alcoholic beverages (shipped into Maryland) in violation of Sec. 1 of the Sherman Act; in this count certain conduct is alleged from which the charge is inferred (R. 10-11, 14-15).

Second: That the defendants knowingly combined and conspired to monopolize trade and commerce in such alcoholic beverages, in violation of Sec. 2 of the Sherman Act, and the same conduct is alleged (by reference) as supporting that charge (R. 13).

Third: That the defendants attempted to monopolize interstate trade and commerce in such alcoholic beverages in violation of Sec. 2 of the Sherman Act and again the same conduct is alleged (by reference) as supporting that charge (R. 13-14). In other words, the conduct alleged in the First Count does triple duty. It may be appropriate

here to note that the government admitted that it had no direct evidence of a conspiracy but implied a conspiracy from the conduct alleged (R. 14-15).

It is specifically alleged in the indictment (Par. 17 of the First Count, par. 3 of the Second Count and par. 4 of the Third Count (R. 12, 13-14)) that it was not the purpose, intent or effect of the offenses charged therein to promote the purpose of the Fair Trade laws of the United States or the State of Maryland. It is noteworthy that a like allegation is not made with respect to the Alcoholic Beverages Law of Maryland (R. 12).

On May 2, 1955 (some 26 days after the indictment was returned) each of the three petitioners was duly dissolved under the laws of the state of its creation (R. 17, 24, 28) for commercial and legal reasons independent of the indictment (R. 22, 26, 34).

On June 27, 1955 motions to dismiss the indictment as to petitioners in view of their dissolutions, were filed by their last directors. These motions were later imported and adopted into other motions to dismiss (filed Nov. 30, 1955) on the ground (among others not here pertinent) that the indictment did not state an offense in view of the Maryland laws regulating sale, traffic and control of alcoholic beverages in that state under the Twenty-first Amendment (R. 16, 27, 23 and 40-43). On June 28, 1955 the petitioners were arraigned and pleas of "not guilty" were entered for each.

On January 10, 1956 the District Court denied all motions to dismiss. Those portions of its opinion pertinent to the two questions here presented are conveniently subheaded as "V. Motion to Dismiss as Against Dissolved Corporations" (138 F. Supp. 706 et seq.; R. 76-82) and "II. Conflict With State Laws and Policy" (138 F. Supp. 692-703; R. 50-71).

On January 6, 1958 the "not guilty" pleas entered on behalf of petitioners on June 28, 1955, were withdrawn and a plea of "nolo contendere" was entered on behalf of each and accepted by the Court and thereupon the petitioners were sentenced to fines as follows:

Melrose Distillers, Inc. — $5,000 on Count One;

CVA Corporation — $5,000 on Count One and $1,000 on Count Three;

Dant Distillery and Distributing Corporation — $5,000 on Count One and $2,500 on Count Three (R. 89-92). Petitioners appealed to the Court of Appeals for the Fourth Circuit, which affirmed the District Court on the 29th day of August 1958 (App. A.).

Raising a question of "double punishment", if the fines against petitioners are sustained and to be collected from their stockholders, is the fact that their sole stockholder, Schenley Industries, Inc., also pleaded "nolo contendere" to the indictment and was fined $5,000 on each of Counts One and Three. It did not appeal. Two individual defendants described in the indictment as Vice-Presidents, active in the direction and operation of petitioners, Melrose Distillers, Inc. and CVA Corporation, respectively, were also fined $2,500 each on their pleas of "nolo contendere". They did not appeal.

It may be pertinent here to note that the government is maintaining a civil action in the District Court based substantially upon the same matters alleged in the indictment. It is true that petitioners (dissolved since May 2, 1955) are not defendants in that civil action, but Schenley Industries, Inc., who was their sole stockholder entitled to their net assets upon their dissolutions, is a party-defendant therein.

The basis for federal jurisdiction in the District Court was an indictment charging violations of Sections 1 and 2 of the Sherman Act (Sections 1 and 2 Title 15, U. S. C. A.).

REASONS FOR GRANTING THE WRIT

1. **The decision of the Court of Appeals conflicts with the decision of two other courts of appeals on the same matter, with respect to the Delaware corporation.**

Concerning the first of the "Questions Presented" and with respect to petitioner Dant Distillery and Distributing Corporation, which was a Delaware corporation, the decision of the Court of Appeals is in direct conflict with decisions of the Courts of Appeals in the Tenth and Sixth Circuits, viz.: *United States v. Safeway Stores, Inc.* (1944, C. A. 10) 140 F. (2) 834); *United States v. Line Material Co.* (1953 C. A. 6) 202 F. (2) 929; *United States v. United States Vanadium Corp.* (1956 C. A. 10) 230 F. (2) 646, cert. den. 351 U. S. 939. In those cases it was held that a Delaware corporation could not be criminally prosecuted under the Sherman Anti-Trust Law after its dissolution, whether such dissolution was voluntary (as in the Safeway case) or by merger (as in the Line Material and Vanadium cases) under the laws of Delaware, and whether such dissolution occurred prior to the indictment (as in the Safeway case) or subsequent to the indictment (as in the Line Material and Vanadium cases). The opinion of the Court of Appeals does not show that in 351 U. S. 939 this Court denied certiorari in *United States v. United States Vanadium Corp.* (1956 C. A. 10) 230 F. (2) 646, which case held, contrary to the Court of Appeals in the case at bar, that dissolution of a Delaware corporation after indictment did abate a federal criminal anti-trust prosecution against it. While denial of certiorari is not affirmance, it could mean that

no radical departure from sound law was apparent in the case. The pertinent Delaware statute is set forth in Appendix B.

2. The Court of Appeals has decided an important state question in a way seemingly in conflict with applicable state law or policy.

Concerning the first of the "Questions Presented" and with respect to petitioner Dant Distillery and Distributing Corporation, which was a Delaware corporation, research has not disclosed that Delaware has construed its own statute on the precise point here involved. When, by its highest court, it does so, that construction will bind the federal courts under the rule in *Northern Pacific R. R. Co. v. Meese* (1915) 239 U. S. 614 (619). It is general knowledge, however, that multitudes of corporations all over the country have elected to incorporate and exist under the laws of Delaware, and it is a most logical assumption that Delaware is very much aware of the preponderating interpretation which her corporate dissolution statutes have received in the federal courts of appeal since 1944 (that dissolution of a Delaware corporation abates a criminal prosecution against it) and further, that such interpretation accords with her own policy and intent. Otherwise, it can be assumed, Delaware would have been quick to reverse that interpretation with one of her own.

With respect to petitioners Melrose Distillers, Inc. and CVA Corporation, which were Maryland corporations, the Court of Appeals has construed a Maryland statute in a way which conflicts with the plain language thereof. The pertinent Maryland statutes on dissolved corporations are set forth in Appendix B. The first section 72(b) (now 76(b)) Art. 23 Ann. Code of Maryland 1951 fixes the

purpose for which a Maryland corporation continues after dissolution to-wit:

> ". . . for the purpose of paying, satisfying and discharging any *existing* debts and obligations. . . ."

The subsequent section (78(a) now 82(a)) id. provides that no such dissolution shall:

> ". . . abate any pending suit or proceeding by or against the corporation . . ."

The later section must be read in pari materia with the first and, so read, can only apply to a suit or proceeding on some debt or obligation existing at the time of the dissolution. The Court of Appeals in affirming the District Court has not read these Maryland statutes in pari materia and has, by its ruling, necessarily and improperly enlarged and expanded the purpose for which corporate existence is continued after dissolution by sec. 72(b) supra, to include a criminal prosecution notwithstanding there is no "existing debt or obligation" in a criminal prosecution, at least until imposition of a monetary fine. In this case, imposition of the fines did not occur until almost three years after these two Maryland corporations had been dissolved, hence these fines could not have been "existing debts or obligations" at the time of dissolution. What has just been said about the meaning of the Maryland statutes on dissolved corporations is strongly supported by the circumstance that by sec. 11 of chapter 399 of the Acts of the General Assembly of Maryland for 1957, section 78(a) (now 82(a)) of Article 23 of the Ann. Code of Maryland was amended to delete the language:

> "Nor shall such dissolution abate any pending suit or proceeding by or against the corporation. . ."

which was then re-enacted by the same legislature (as Rule 222 Maryland Rules of Procedure for the Court of

Appeals and Judicial Circuits of Maryland) using only the term "action", as follows:

> "An *action* by or against a corporation shall not abate by reason of the dissolution, forfeiture of charter, merger, or consolidation of such corporation. Such *action* may be continued with such change of parties as the court may direct."

This subsequent change of the term "suit or proceeding" to "action" is significant that the former term "suit or proceeding" was never intended to be wider than "action" which in customary parlance does not include a criminal prosecution. This is borne out by the fact that Rule 222 applies only to Civil actions, since the Rules pertaining to Criminal prosecutions commence at Rule 701.

3. The Court of Appeals has decided that criminal prosecution of a private corporation survives its dissolution, contrary to applicable decisions of this Court.

With respect to the first of the "Questions Presented" the decision of the Court of Appeals conflicts with applicable decisions of this Court. In *Oklahoma Natural Gas Co. v. Oklahoma* (1927) 273 U. S. 257 (259) this Court, speaking necessarily with reference to *legal* affairs, liabilities and properties, said that in the federal jurisdiction the result of a corporate dissolution cannot be distinguished from the death of a natural person in its effect. This "equation" was repeated with approval in *Chicago Title and Trust Co v. Wilcox Bldg. Corp.* (1937) 302 U. S. 120 (125). The analogy is at once accurate and complete. On the death of a natural person his assets, subject to payment of his debts, are equitably owned by his heirs or legatees. On the dissolution of a corporation, its assets, subject to payment of its debts, are equitably owned by its stockholders. In addition to distribution of the remain-

ing assets, the end to be attained in each case is "discharge of debts or obligations *existing* at the death of the natural person or the dissolution of the corporation." The term "existing" is emphasized because there can be none other since a deceased natural person cannot incur a "new" debt or obligation and neither can a dissolved corporation except, conceivably, for winding-up purposes — a situation not here suggested or involved. To continue the analogy, this end is attained by probate proceedings following death of the natural person and by statutes continuing corporate existence following dissolution in the case of a corporation. By failing to credit this analogy, the Court of Appeals has concluded that a dissolved corporation continues to exist not only for the purpose of discharging its existing debts and obligations but for the purpose of criminal prosecution and subsequently imposed criminal fines. Furthermore, if the analogy referred to is to be respected, it is submitted that the decision below runs counter to the rule announced in *Schreiber v. Sharpless* (1883) 110 U. S. 76 (80):

> "At common law actions on penal statutes do not survive, and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it. As the nature of penalties and forfeitures imposed by acts of Congress cannot be changed by state laws, it follows that state statutes allowing suits on state penal statutes to be prosecuted after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress."

4. The decision of the Court of Appeals Obliterates the Essential Difference in Nature between a Civil or Remedial Action and a Criminal Prosecution.

This point also pertains to the first of the "Questions Presented". The aim of the civil or remedial action is compensatory; the aim of the criminal prosecution is punitive. In the first the issue is "liability" and the recovery is compensatory, indicative of some underlying or pre-existing obligation and as a remedy for it. In the second, the issue is "guilt or innocence" of a public offense and if a fine is imposed upon an adjudication of guilt, it is not compensation in any sense but is purely punishment — a forfeiture or exaction and not indicative of any underlying or pre-existing obligation of the defendant to anyone, and bearing no relation whatever to any damage suffered by anyone at the hands of the defendant. Indeed, there may be an adjudication of guilt with no fine at all imposed. Hence it is clear that a criminal fine has and can have no existence prior to the moment it is lawfully imposed. This ineradicable distinction in nature between the two is highlighted in every day law by the fact that the same person may be criminally prosecuted and fined for a criminal act with no effect whatever upon his civil or remedial liability to any person injured by the same act. Thus the criminal can escape the punishment by dying (only particeps criminis can be punished) and whether he dies by his own hand is immaterial; but his estate cannot escape remedial liability for damage occasioned another by his criminal act. In affirming the District Court in the imposition of criminal fines on petitioners almost three years after their dissolutions, the Court of Appeals has ignored this fundamental distinction in a way that will create doubt and confusion in this area of the law, calling for correction by this Court.

5. The Indictment was Insufficient as to Petitioners

With respect to the second of the "Questions Presented" it is submitted that at all times pertinent Maryland had a comprehensive Alcoholic Beverage Law. The pertinent parts thereof are in Appendix B, pp. 26-27. In *Dundalk Liquor Co. v. Tawes* (1951) 197 Md. 446, 79 A. (2) 525 (528-529) the Court of Appeals of Maryland held that a then existing Regulation 206 under the Alcoholic Beverages Law of that state permitted a horizontal price fix by the state comptroller in alcoholic beverages which was unauthorized by the underlying statute itself. Thereupon the state legislature added sections 1 and 105 (now 109) to Article 2B Ann. Code of Maryland 1951 (Appendix B, pp. 26, 29) expressly authorizing the type of regulation which the Court had ruled out. In the later case of *Dundalk Liquor Co. v. Tawes* (1952) 201 Md. 58, 92 A. (2) 560 (562), the same Court held in substance that such legislation was within the competence of the State of Maryland under the Twenty-first Amendment even though it assumed that, without the power of the Amendment, it might involve violation of the Sherman Act. It is further submitted that the acts charged in the indictment as violations of sections 1 and 2 of the Sherman Act were compatible with the Alcoholic Beverages Law of Maryland therefore not indictable offenses under the Sherman Act under the rule expressed in *Washington Brewers Institute v. United States* (1943) 137 F. (2) 964 (968) cert. den. 320 U. S. 776:

> "By the terms of its fundamental law the national government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic in intoxicants within its borders."

and in *United States v. Frankfort Distilleries, Inc.* (1945) 324 U. S. 293 and especially in the separate concurring opinion of Mr. Justice Frankfurter (301):

> "If an agreement among local dealers . . . does not offend the Sherman Law, though a like agreement as to other commodities (than liquor) would, an agreement among liquor dealers to abide by state policy for a uniform price . . . can hardly be a violation of the Sherman Law. . . ."

and (302):

> "For in any event, if state policy did so authorize it, conformity with the state policy could not be decreed an unreasonable restraint of interstate commerce."

It would appear that in this respect the Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this Court in view of the Maryland Alcoholic Beverages Law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A.

Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit.

(Note) In accord with Rule 23(1)(i) of the Supreme Court, the opinion of the District Court, reported in 138 F. Supp. 685 et seq., is omitted. It appears on pages 43-82 of the record as printed for use of the Court of Appeals, nine copies of which are filed with this petition.

United States Court of Appeals for the Fourth Circuit

No. 7608

Melrose Distillers, Inc., CVA Corporation, and Dant Distillery and Distributing Corporation,

Appellants,

versus

United States of America,

Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore

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(Argued June 4, 1958. Decided August 29, 1958.)

Before Soper and Haynsworth, Circuit Judges, and Moore, District Judge.

Robert S. Marx (Roy G. Holmes; Hilary W. Gans; Markell, Veazey & Gans, and Nichols, Wood, Marx & Ginter on brief) for Appellants, and Wilford L. Whitley, Jr., At-

torney, Department of Justice, (Victor R. Hansen, Assistant Attorney General; George H. Schueller, Attorney, Department of Justice, and Leon H. A. Pierson, United States Attorney, on brief) for Appellee.

MOORE, District Judge:

Appellants Melrose Distillers, Inc. and CVA Corporation are dissolved Maryland corporations. Appellant Dant Distillery and Distributing Corporation is a dissolved Delaware corporation. They were convicted along with numerous other defendants not involved here on their plea of nolo contendere to a three count indictment charging conspiracy to fix wholesale and retail prices of alcoholic beverages shipped into the State of Maryland by outside manufacturers, and to monopolize and attempt to monopolize interstate trade and commerce therein in violation of Sections 1 and 2 of the Sherman Act. The indictment was returned on April 6, 1955. The corporations were all dissolved on May 2, 1955. The plea of nolo contendere was filed on January 6, 1958. Prior to their plea of nolo contendere, appellants had pleaded not guilty and had moved to dismiss the indictment on the grounds, so far as pertinent here, (1) that each of them had been dissolved prior to the plea of nolo contendere, and (2) that the alleged acts and conduct of defendants charged in the indictment "were permitted, sanctioned, and encouraged" by the announced governmental policy and law of the State of Maryland.

The questions involved in appellants' motions in the District Court to dismiss the indictment survive the plea of nolo contendere, *Universal Milk Bottle Service v. United States*, 6 Cir., 188 F. 2d 959. Hence, appellants would be entitled to a reversal of their conviction notwithstanding the plea of nolo contendere should their contentions regarding the indictment be sustained on this appeal.

The law of Delaware providing for the survival for certain purposes of dissolved corporations (Section 278 of the

General Corporation Law of the State of Delaware, (8) Del. C. §278) reads as follows:

"All Corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings, so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."

Corresponding provisions of the law of Maryland are:

"The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs." Section 72(b) Article 23 of the Annotated Code of Maryland (1951) (now Section 76(b)) and

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed upon them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be

continued with such substitution of parties, if any, as the court directs . . ." Section 78(a) iden.

Appellants argue that both the Delaware and the Maryland statutes should be interpreted to mean that a dissolved corporation survives its dissolution only for the purpose of winding up its civil affairs and discharging its civil obligations; but that no criminal charges which have not been disposed of by imposition of a fine or penalty survive the dissolution of the corporations. Stated more clearly, the argument is that insofar as pending criminal proceedings are concerned, the dissolution of a corporation is equivalent to the death of a natural person and that unless the legislature of the state of the corporation's birth shall have specifically provided otherwise (as they contend neither Delaware nor Maryland has done) a pending criminal proceeding can go no farther. We think this contention is based upon a strained and artificial interpretation of the statutory language. There may be situations in which a precise and restrictive meaning should be given to the words "action, suit or proceeding" as used in the Delaware statute and the words "suit or proceeding" as used in the Maryland statute. However, the application of these words where the question involves the abatement or survival of criminal prosecutions pending against corporations does not present such a situation. To give them the constructions for which appellants contend would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequence of their criminal acts by the simple process of voluntary dissolution.

That there is a division of authority on this question can not be denied. The Tenth Circuit in the case of *United States v. Safeway Stores, Inc.*, 10 Cir., 140 F. 2d 834, in considering the same Delaware statute involved here, concluded that the word "suits" does not include a criminal prosecution. It is to be noted, however, that the Court in that case did not even consider, much less interpret, the broader term "proceedings", appearing in the same statute. Moreover, the corporations involved there had been dis-

solved prior to indictment, and therefore there was no "pending" proceeding.

In the later case of *United States v. United States Vanadium Corporation*, 10 Cir., 230 F. 2d 646, decided by a different panel of judges of the Tenth Circuit, that Court, while adhering to the doctrine of the Safeway case, said that the panel of judges who decided the *Vanadium* case were not "in full sympathy with the law as declared in the *Safeway* case", and strongly intimated that were it not for their feeling "that one panel of the Court should not lightly overrule a decision by another panel" they would have arrived at a different conclusion.

In *United States v. Line Material Company*, 6 Cir., 202 F. 2d 929, the Court of Appeals for the Sixth Circuit, construing this same Delaware statute, held that the words "action, suit or proceeding" did not embrace a criminal prosecution.

On the other hand, the Court of Appeals for the Seventh Circuit, in the case of *United States v. P. F. Collier & Son Corporation*, 7 Cir., 208 F. 2d 936, reached exactly the opposite conclusion. The reasoning of that Court was as follows:

> "We have read and reread defendants' argument, as well as the many cases cited in support of the order appealed from, but we are unable to escape what we think is the plain, unambiguous terminology contained in the Delaware statute. The words 'any action, suit, or proceeding' in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty. The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on the legislative intent. If, however, the legislature had intended to embrace only civil litigation, it could easily have done so by the addition of a single word, 'civil' and could have provided for 'any civil action, suit or proceeding.' Or if it had intended to exclude a criminal prosecution

from the broad and inclusive language which it employed, it could readily have done so by providing, 'any action, suit or proceeding other than a criminal prosecution.' And while it may be an immaterial observation, no sound reason occurs why a legislature would intend to relieve a dissolved corporation of its criminal liability, and at the same time preserve its civil liability. A corporation cannot be sent to jail; the discharge of its liability whether criminal or civil can only be effected by the payment of money."

In our view the *Collier* case correctly interprets and applies the words of the Delaware statute. We have held in a tax case, construing the very Delaware statute involved here that "(T)he word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the statute." *Bahen & Wright, Inc. v. Commissioner of Internal Revenue*, 4 Cir., 176 F. 2d 538. See also *United States v. Maryland and Virginia Milk Producers, Inc.*, 145 F. Supp. 374 (D. C. Dist. Col.).

We find the Maryland statute to be, in all its essentials, of like effect to that of Delaware. We conclude therefore that under the applicable statutes, both of Delaware and Maryland, the dissolution of appellant corporations did not extinguish their liability in pending criminal proceedings against them.

Appellants' motions in the District Court to dismiss Counts 1 and 2 of the indictment on the ground that the alleged acts and conduct of defendants charged therein "were permitted, sanctioned, and encouarged" by the announced governmental policy and law of the State of Maryland was without merit, and was properly overruled.

Two Maryland statutes were cited in support of this motion. One was the Maryland Alcoholic Beverages Law; the other the Maryland Fair Trade Law. The pertinent portions of the Alcoholic Beverages Law merely provide against discrimination by manufacturers and wholesalers in price, discounts, or quality of merchandise between one

customer and another; and further that the Comptroller of the Treasury shall prescribe maximum discounts and require manufacturers and wholesalers to file a schedule of their prices to their customers, and to file with the Comptroller any proposed price change, which change, if a reduction in price, is to be postponed for a period of time prescribed by the Comptroller sufficient to permit notice to other manufacturers or wholesalers selling similar wines or liquors and an opportunity for them to make a like price decrease. Obviously, this system of regulation preserves free and open competition among retailers, and could not by any stretch of the imagination be denominated "horizontal" price fixing.

The Fair Trade Law of Maryland, as do most such State Fair Trade laws, merely permits manufacturers and wholesalers of trade-marked goods which are in free and open competition with other goods of the same class to fix the retail price of these goods for the purpose of protecting the trade mark. Neither the Maryland Fair Trade Law nor the Maryland Alcoholic Beverages Law affords protection against prosecution for a conspiracy to fix prices "horizontally" or a conspiracy to monopolize trade or an attempt to do so.

The indictment in count one charged a conspiracy to bring about "horizontal" price fixing; in count two it charged a conspiracy to monopolize interstate trade and commerce in alcoholic beverages, and in count three it charged an attempt to monopolize such trade and commerce. None of these acts is in any way permitted, sanctioned, or encouraged by the announced governmental policy and law of the State of Maryland.

It follows from what has been said that the judgment of the District Court is

Affirmed.

JUDGMENT

Filed and Entered August 29, 1958.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7608

Melrose Distillers, Inc., CVA Corporation, and Dant Distillery and Distributing Corporation,

Appellants,

vs.

United States of America,

Appellee.

APPEALS FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from, in this cause, be, and the same are hereby, affirmed.

MORRIS A. SOPER,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge

BEN MOORE,
United States District Judge.

APPENDIX B.

Relevant Constitutional Provisions and Statutes

The Twenty First Amendment

Section 2 of The Twenty First Amendment to the Constitution of the United States (adopted December 5, 1933) provides:

> "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Sherman Anti-Trust Law

Section 1 of the Sherman Act (Section 1, Title 15 USCA) as it stood when this indictment was returned, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: *Provided*, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided Further*, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment

or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Section 2 of the Sherman Act (Section 2 Title 15 USCA) as it stood when the indictment was returned, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Authority for Review by Certiorari

Section 1254(1) Title 28 USCA provides:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) * * *":

Delaware Corporation Law

Section 278 Delaware General Corporation Law (Section 278, Title 8, Chapter 1, Delaware Code of 1953) in its pertinent parts:

"All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgment, orders, or decrees therein shall be fully executed."

Maryland Corporation Law

Section 72(b) (now 76(b)) Article 23, Annotated Code of Maryland, 1951:

"The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs."

Section 74 (now 78) Article 23, Annotated Code of Maryland 1951:

"(a) Upon dissolution of any corporation of this State, and unless and until one or more receivers of the property and assets of the corporation have been appointed by a court of competent jurisdiction, the directors shall become and be, for purposes of liquidation, trustees of the property and assets of the corporation so dissolved.

(b) * * *. They shall proceed to collect and distribute the assets of the corporation, applying such assets to the extent available to the payment, satisfaction and discharge of existing debts and obligations of the corporation, including necessary expenses of liquidation, and distributing the remaining assets among the stockholders. * * *."

Section 78(a) (now 82(a)) Article 23 Annotated Code of Maryland 1951:

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. * * *."

MARYLAND LIQUOR LAW

Section 1 Article 2B, Annotated Code of Maryland 1951 (added in 1951):

"It is hereby declared as the policy of the State that it is necessary to regulate and control the manufacture, sale, distribution, transportation and storage of alcoholic beverages within this State and the transportation and distribution of alcoholic beverages into and out of this State to obtain respect and obedience to law and to foster and promote temperance. It is hereby declared to be the legislative intent that such policy

will be carried out in the best public interest by empowering the Comptroller of the Treasury, the State Appeal Board, the various local Boards of License Commissioners and Liquor Control Boards, all enforcement officers and the Judges and Clerks of the various Courts of this State with sufficient authority to administer and enforce the provisions of this Article. The restrictions, regulations, provisions and penalties contained in this Article are for the protection, health, welfare and safety of the people of this State. It shall also be the policy of the State to tax alcoholic beverages as provided in this Article: * * *."

Section 105 (now 109) Article 2B, Annotated Code of Maryland 1951 (added in 1951):

"(a) It is the declared policy of this State that it is necessary to regulate and control the sale and distribution within the State of wines and liquors, for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars, which unduly stimulate the sale and consumption of wines and liquors and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of wines and liquors should be subjected to the following restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination."

"(b) The Comptroller, is authorized and directed, by regulations, to prescribe the maximum discounts which may be allowed by any manufacturer or wholesaler in the sale and distribution of various quantities of wines and liquors. Said regulation may also, in the discretion of the Comptroller, prohibit the giving of discounts by any manufacturer or wholesaler in the sale and distribution of any or all quantities or kinds of wines and liquors."

"(c) The Comptroller is authorized and directed, by regulation, to require the filing, from time to time, by any manufacturer or wholesaler or non-resident dealer, of schedules of prices at which wines and liquors are sold by such manufacturer or wholesaler or non-resident dealer, and further to require the filing of any proposed price change. Said regulation shall provide that the effective date of any proposed price decrease shall be postponed for such period of time as the Comptroller may prescribe sufficient to permit notice thereof to other manufacturers or wholesalers selling similar wines and liquors and an opportunity for the same to make a like price decrease. Said regulation shall also provide that any manufacturer or wholesaler or non-resident dealer proposing to sell any wines and liquors not currently being sold by the same shall first give notice to the Comptroller of the prices at which such wines and liquors are proposed to be sold; and said regulation shall further provide that sales of such wines and liquors shall not be made for such period of time as the Comptroller may prescribe sufficient to permit notice thereof to other manufacturers or wholesalers selling similar wines and liquors and an opportunity for such other manufacturers or wholesalers to alter the price of such similar wines and liquors so as to make that price comparable to the price fixed by the manufacturer or wholesaler proposing to sell wines and liquors not currently being sold. The Comptroller is authorized and empowered, in promulgating the regulations required by this subsection, to require the filing by any manufacturer or wholesaler or non-resident dealer of any other information with regard to the size, containers, brands, labels, descriptions, packages, quantities to be sold and any other data in connection with wines and liquors as the Comptroller may reasonably determine."

"(d) Any person violating any of the provisions of any regulation promulgated under the authority contained in this section shall be subject to the penalties

provided in Sections 4 and 66, as the case may be, of this Article."

"(e) Nothing contained in this section shall be construed to authorize the Comptroller to fix the prices at which any wines and liquors may be sold by any manufacturer or wholesaler or non-resident dealer other than to fix permissible discounts which may be allowed by any manufacturer or wholesaler on such sales and other than to postpone the effective date of any proposed price decrease in the sale and distribution of wines and liquors currently sold by any manufacturer or wholesaler or non-resident dealer or the effective date of the sale of any wines and liquors not currently being sold by any manufacturer or wholesaler or non-resident dealer for a reasonable period sufficient to permit the filing of proposed price decreases or proposed sales of wines and liquors not currently being sold, as the case may be, with the Comptroller and notice thereof to other manufacturers or wholesalers, and an opportunity for the same to make like price changes. Nothing contained in this section shall be construed to require any manufacturer or wholesaler or non-resident dealer of wines and liquors to make sales to any licensees under the provisions of this Article."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 404

MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

For brevity and convenience the Petitioners will be referred to in this brief as "Melrose", "CVA" or "Dant" or as "Petitioner" or "Petitioners" either singly or in combination, as may best serve the context.

The use of *italics* herein indicates emphasis supplied, except in the entitling of authorities or as otherwise expressly stated.

References to the printed record will be, for example, (R. 10).

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *258 F. (2d) 726-730*, and appears in (R. 68-74).

The opinion of the District Court is reported in *138 F. Supp. 685-709* (that portion of it which pertains to the Question Presented commences on page 706) and appears in (R. 40-52).

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1958 (R. 74). The jurisdiction of this court is invoked under *Sec. 1254(1), Title 28, U.S.C.A.* which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The petition for writ of certiorari was filed in the office of the Clerk of the Court on September 26, 1958, and granted by this Court (limited to Question No. 1 presented by the petition) on November 10, 1958 (R. 75).

STATUTES INVOLVED

Federal Antitrust Statutes

The statutes under which Petitioners were indicted in the District Court were Sections 1 and 2 of the Sherman Anti-trust Law, hereinafter immediately following.

Section 1, Title 15 U.S.C.A. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; as amended August 17, 1937, c. 690, Title VIII, 50 Stat. 693) provides, verbatim:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or

the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2, Title 15 U.S.C.A. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209) provides, verbatim:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000; or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

Section 7, Title 15 U.S.C.A. (July 2, 1890, c. 647, Sec. 8, 26 Stat. 210) provides, verbatim:

> "The word 'person', or 'persons', wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."

Since Petitioners were corporations at the time they were indicted and since an officer of each was indicted along with them, there is involved *Section 24, Title 15 U.S.C.A.* (Oct. 15, 1914, c. 323, Sec. 14, 38 Stat. 736) which provides, verbatim:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

Maryland Statutes

Since two of the Petitioners, Melrose and CVA, were Maryland corporations when indicted on April 6, 1955, and since they dissolved under the laws of Maryland on May 2, 1955, the Maryland statutes immediately following are involved. *Section 72(b), Article 23, Annotated Code of Maryland (1951)*, (now 76(b)) provides, verbatim:

> "The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence

for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs."

and *Section 78(a)* (Now 82 (a)) id., provides, verbatim:

"The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. No receiver shall institute suit except by order of the court appointing him; and such suit be brought in his own name as receiver or, notwithstanding its dissolution, in the name of the corporation, to his use."

Delaware Statute

Since the Petitioner, Dant, was a Delaware corporation when indicted on April 6, 1955, and since it dissolved under the laws of Delaware on May 2, 1955, the Delaware statute immediately following is involved. *Section 278 of the Delaware General Corporation Law* (Sec. 278, Title 8, Del. Code, 1953) provides:

"All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or

proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."

QUESTION PRESENTED

On April 6, 1955, Petitioners, who were, respectively, two Maryland corporations and a Delaware corporation, and who were wholly owned subsidiaries of Schenley Industries, Inc., a Delaware corporation, were indicted in three counts (along with an officer of each of them, their corporate parent, and some forty-eight other defendants) for alleged violations of *Sections 1 and 2 of the Sherman Act* (Sections 1 and 2, Title 15, U.S.C.A.) (R. 1-12).

On May 2, 1955, Petitioners, Melrose and CVA, were duly dissolved under the laws of Maryland and Petitioner, Dant, was duly dissolved under the laws of Delaware (R. 15, 26, 22), all for commercial and legal reasons having nothing to do with the indictment (R. 20, 24, 31). On June 27, 1955, motions to dismiss as to these three petitioners (on the ground that they were dissolved) were filed on their behalf (R. 14, 25, 21) and later adopted into other motions, filed November 30, 1955, to dismiss on other grounds not here pertinent (R. 37-39).

On January 30, 1956, the District Court denied the motions to dismiss (R. 52-53) and some two years later on January 6, 1958, adjudged Petitioners (and others) guilty upon pleas of "nolo contendere" and sentenced them to fines aggregating $18,500 (R. 55-57). The Court of Appeals affirmed (R. 74). This Court granted the writ of certiorari to the Court of Appeals (R. 75) under which the sole question presented for review is:

"Can either a Maryland corporation or a Delaware corporation be further criminally prosecuted in a federal court for a federal offense after its dissolution under the applicable state law, where such dissolution occurs after indictment, before arraignment or plea, and timely appears of record in the case?"

STATEMENT OF THE CASE

An indictment (R. 1-12) covering the period from January 1950 to the date of its return was returned in the District Court on April 6, 1955, against 24 corporate and 31 individual defendants.

Among the 24 corporate defendants were the three Petitioners herein (R. 2) as well as their parent corporation, Schenley Industries, Inc., a Delaware corporation (R. 2) of which they were wholly owned subsidiaries (R. 46). Among the 31 individual defendants was an officer of each of the petitioners, described as having been actively engaged in its management, direction or operation and as having authorized, ordered or done some or all of the things charged against it (R. 3, 5).

The indictment, in a total of three counts, charged violations of *Sections 1 and 2 of the Sherman Act* (Sections 1 and 2, Title 15, U.S.C.A. supra) with respect to alcoholic beverages shipped into Maryland from manufacturers located outside of Maryland. The first Count alleged a conspiracy to fix and regulate prices (R. 8). The second Count alleged a conspiracy to monopolize trade and commerce (R. 11). The third Count alleged an attempt to monopolize trade and commerce (R. 11-12). The same conduct alleged in support of the first Count was re-alleged by reference to support the second and third Counts (R. 11-12), and the Government conceded that it had no direct evidence of a conspiracy but implied a conspiracy from the conduct alleged (R. 12-13).

On May 2, 1955, some 26 days after the indictment was returned, each of the three Petitioners was dissolved under the laws of the State which created it (R. 15, 26, 22), for commercial and legal reasons independent of the indictment (R. 20, 24, 31).

On June 27, 1955, a motion to dismiss the indictment as to each of the three Petitioners (because of its dissolution) was filed by its last directors (R. 14, 25, 21). These motions were later adopted and carried forward into other motions to dismiss (filed November 30, 1955) containing other grounds not here pertinent (R. 37-39).

While these motions to dismiss were pending and on June 28, 1955, Petitioners were arraigned and a plea of "not guilty" was entered for each.

On January 10, 1956, the District Court denied all motions to dismiss and that portion of its opinion pertinent to the question here presented is conveniently sub-headed as *"V. Motion to Dismiss as against Dissolved Corporations"* (138 F. Supp. 706 et seq.; R. 46-52).

Almost two years later, on January 6, 1958, the pleas of "not guilty" entered on behalf of these Petitioners on June 28, 1955, were withdrawn (R. 60, 62, 65) and a plea "nolo contendere" was entered on behalf of each and accepted by the court (R. 61, 63, 66) and thereupon Petitioners were sentenced to the following fines:

Melrose	$5,000 on Count One
CVA	$5,000 on Count One and $1,000 on Count Three
Dant	$5,000 on Count One and $2,500 on Count Three.

(R. 55, 56, 57).

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit which, although holding that

the questions involved in the Petitioners' motions to dismiss in the District Court survived the pleas of "nolo contendere", affirmed the fines imposed by the District Court, on August 29, 1958 (*258 F. (2d) 726;* R. 68-74).

As a matter of factual background (not in this record but which cannot be disputed) indicative of "double punishment", if the fines against Petitioners are sustained and to be collected from their stockholders, is the fact that their sole stockholder, Schenley Industries, Inc., also pleaded "nolo contendere" to the same indictment and was fined $5,000 on each of Counts One and Three. It did not appeal. Furthermore, two individual defendants described in the indictment as Vice-Presidents, active in the direction and operation of Petitioners, Melrose and CVA, respectively, were also fined $2,500 each on their pleas of "nolo contendere" to the same indictment. They did not appeal.

SUMMARY OF ARGUMENT

(1) The lower courts failed to heed the essential and fundamental distinction which necessarily exists between civil or remedial liability and so-called "criminal liability".

(2) State statutes prolonging corporate existence for winding-up purposes after corporate dissolution are but the corporate equivalent of probate proceedings in the death of a natural person, within the ambit of this Court's equation of a corporate dissolution to the death of a natural person.

(3) The dominant object of criminal punishment is prevention of crime and is fully attained upon dissolution of the corporate offender and no public policy suffers if such dissolution abates a criminal prosecution against it.

(4) The stated statutory purpose of "post-dissolution" existence of a Maryland corporation excludes its criminal prosecution and fine. The 1957 change in that statute is a clue to its prior meaning.

(5) The statutory purpose of "post-dissolution" existence of a Delaware corporation excludes its criminal prosecution and fine although there is division among the circuits on the question. The *Collier* decision is erroneous.

(6) The phrase "action, suit or proceeding" has been construed by the Court of Appeals of New York, in a not-too-dissimilar setting, to mean "action" at law, "suit" in equity or a special "proceeding", but *not* a criminal prosecution.

(7) The "spark-of-life" theory has been rejected by this Court.

ARGUMENT

(1) There is a Fundamental Difference in Nature and Purpose between a Civil or Remedial Action and a Criminal Prosecution.

Concerning the Sherman Anti-trust Act, it was said in *Roseland v. Phister* (1942) 125 F. (2d) 417, 419, C.C.A. 7:

> "The Act is *penal* so far as *criminal* liability is concerned but is remedial insofar as it creates a remedy for damages."

The prosecution of Petitioners under the indictment returned on April 6, 1955, was, of course, completely penal. The object was to prove them guilty of violating criminal provisions of the Anti-trust Statutes of the United States to be followed by pecuniary fines which, in the discretion of the court, could be fixed at any amount from one cent to Five Thousand Dollars *(Secs. 1 and 2 Title 15, U.S.C.A.,*

supra). The object was *not* to prove a remedial liability against them or a liability to make whole. Citations are unnecessary (but available) to support the premise that a fine imposed in a criminal case is "punishment". Such a fine is always a "forfeiture" (although a forfeiture is not always a fine). It is synonymous with "mulct". These definitions emphasize that such a fine, in nature, is neither compensatory nor remedial as is a civil judgment where the aim is compensation of some pre-existing liability, whether contractual, tortious or statutory. Such a fine, upon payment, becomes *public* funds in the hands of the Government for Governmental purposes and such funds are not held as compensation or remedy to or for the benefit of anyone. The issue in the criminal case is not remedial liability to another but simply "guilt or innocence" of the public offense charged. Even where that issue is resolved *against* the accused it does not *necessarily* follow that he will suffer *any* punishment for it is within the discretion of the court to suspend imposition or execution of sentence under *Sec. 3651 Title 18, U.S.C.A.* Furthermore, under *Sec 1 and 2 of the Sherman Act* (Sec. 1 and 2 Title 15, U.S.C.A., supra) the *amount* of fine to be imposed upon proof of violation thereof is not fixed and certain but rests in the sound discretion of the court within the statutory maximum. The fine, when imposed, being in nature punitive only and in no wise compensatory or remedial, connotes no pre-existing or underlying pecuniary obligation of the defendant to anyone and thus can have no relation back to any previous detriment suffered by anyone at the hands of the defendant. Those factors, which inseparably inhere in the criminal prosecution, indubitably point the conclusion that a fine in a criminal case has and can have no existence until it is imposed and then, being punishment purely, it has no retroactive operation, signifi-

cance or implication whatever. Indeed, it would be difficult if not impossible to imagine a punishment operating retroactively. Can a convicted person be hanged today — *as of yesterday?* Can a convicted person be fined today — *as of yesterday?* This is the essential distinction between liability for a criminal fine and liability for a civil or remedial claim which seemingly was overlooked in the Courts below and which went unrecognized in the *Collier* case (*United States v. Collier* (1953) 208 F. (2d) 936 C.A. 7) upon which the Courts below largely relied. That the criminal fine has no existence until imposed and, when imposed, carries no backward liability, is a truism which finds practical expression in every application of the rule that the same person may be criminally prosecuted and fined for an unlawful act without in the least affecting his civil or remedial liability to any person injured thereby. Otherwise stated, no matter how large his fine in the *criminal* case, the defendant could not plead one penny of it either in mitigation or in defense of any *civil* liability arising out of the very same act for which he was fined. A good example of this is found in the treble-damage section of the Federal Anti-trust laws themselves (*Sec. 15, Title 15, U.S.C.A.*). This attribute of our law is clearest recognition that, while a criminal may escape *punishment* by dying (since only the criminal can be *punished* for the crime), his estate cannot escape *compensating* for the loss or injury which his criminal act has caused another. In the venerable case of *Fay v. Parker* (1873) 53 N.H. 342, 16 Amer. Rep. 270, it was said:

> "A synonym of 'damage' when applied to a person sustaining an injury, is 'loss'. Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. 'Damage' (in French 'dommage'; Latin 'damnum', from 'demo', to take away) signifies the thing taken away — The lost thing

which a party is entitled to have restored to him, so that he may be made whole again. When used to signify the money which a plaintiff ought to recover, 'damage' is never nor in any sense synonymous with, nor collateral to, the terms 'example', 'fine', 'penalty', 'punishment', 'revenge', 'discipline', or 'chastisement'. Loss or damage sustained — the thing taken away — may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage."

(2) The Petitioners' "Post Dissolution Existence Was but the Equivalent of Probate Proceedings on the Death of a Natural Person.

In *Chicago Title & Trust Co. v. Wilcox Building Corp.* (1937) 302 U. S. 120, this Court said (124-125):

> "The decisions of this Court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, *the result of which may be likened to the death of a natural person.*"

The question involved in that case was whether a dissolved Illinois corporation, which still had a limited existence or "spark-of-life" under state law, could avail itself of the Federal Bankruptcy Act which on its face was open to "*any* corporation" And which defined corporations as "all bodies having *any* of the powers and privileges of corporations". It will be recognized that the question, in principle at least, is not remote from that presented here; which will be more fully treated hereinafter.

When this Court equated the corporate dissolution to the death of a natural person, it drew a more accurate analogy, seemingly, than Respondent will admit. On the death of a natural person, his assets, subject to payment of

his debts, are equitably owned by his heirs or legatees. On dissolution of a corporation, its assets, subject to payment of its debts, are equitably owned by its stockholders (*Meredith v. Washington Loan & Trust Co.* (1926) 151 Md. 274, 134 A. 206 (209)). The first end to be attained in each case is payment of obligations *existing* at the date of death of the natural person or *existing* at the *dissolution of the corporation*. This limitation to obligations *existing* at the date of death of the natural person or of dissolution of the corporation is inescapable because no new obligations can be incurred by either the dead person or the dissolved corporation (except sometimes by statute, a dissolved corporation may borrow money for purposes of liquidating and winding up — a situation not here involved). The second end to be attained is distribution of the remaining assets in each case to those entitled to them.

Since, as we have seen, the issue in a criminal case is simply that of "guilt or innocence" of a public offense it seems to follow clearly that upon death of the individual offender or dissolution of the corporate offender, that issue becomes forever moot. No sentence of fine thereafter imposed could be an obligation of the deceased person *at the time of his death* or the dissolved corporation *at the time of its dissolution* because the fine, being punishment only, has no existence until it is imposed and then has no retrospective operation. In the case of these Petitioners, it will be recalled that their dissolutions occurred on May 2, 1955 (R. 15, 26, 22) and they were neither convicted nor fined until January 6, 1958, over 2½ years later (R. 55-57). Because of the essential difference in nature and purpose between criminal fines and civil judgments their fines were not, and could not have been, *existing* obligations or liabilities of Petitioners at the time of their dissolutions.

Statutes prolonging the life of a dissolved corporation are *remedial*, i.e., designed to afford a remedy for some obligation existing at the time of dissolution. For a specific instance, the Delaware statute was under discussion in *Bahen & Wright v. Com. of Int. Rev.* (1949) 176 F. (2d) 538 C.A. 4, when the court said 539):

"Statutes of this type are broadly remedial . . .".

and in *Sec. 8158 Fletcher Cyclopedia Corporations* (Perm. Ed.) it is said:

"Statutes for winding up the affairs of dissolved corporations are embodiments of equitable doctrines and afford legal remedy where before there was none. They are *remedial*, and should receive liberal construction."

and Sec. 8220, id:

". . . the statutory provision continuing corporations in existence for a limited time after dissolution does not extend the right to sue such corporations on *debts not in existence at the time of the dissolution.*"

Cited to the foregoing section is *Callahan v. Clemens* (1945 Md. Ct. of App.) 184 Md. 520, 41 A. (2d) 473 (476) wherein the court, speaking of a corporate dissolution in Maryland, said:

"Dissolution occurred on Feb. 23, 1939, and the rights of creditors *became fixed at that time.*"

Approaching this court's equation of a corporate dissolution to the death of a natural person from another viewpoint, one of the incidents of the death of a natural person is that it *abates* any criminal prosecution against him. The reason is simple. In such prosecution the issue is "guilt or innocence" and when the accused dies even after conviction and pending appeal, that issue is moot and the prosecution abates *ab initio*. There is an annotation to such

effect, replete with cases, entitled *"Death of Defendant Pending Appeal from Conviction as Abating Criminal Prosecution"* in *96 A.L.R. 1322*. In *List v. Pennsylvania*, 131 U.S. 396; and *Menken v. Atlanta*, 131 U.S. 405, it was held that:

> "The death of the accused in a criminal case brought here by writ of error abates the suit."

In *United States v. Mitchell* (1908 Cir. Ct., D. Ore.) 163 Fed. 1014, Mitchell had been convicted and fined for violation of a federal statute. While the case was pending in this Court on writ of error, Mitchell died. This Court held the case abated and dismissed the writ in *199 U.S. 616*. The Government then presented a claim for the fine against Mitchell's estate. The Circuit Court held that the fine could not be collected after Mitchell's death. It said (1016-1017):

> "A fine is a *pecuniary punishment* imposed . . . upon a person convicted of crime . . . Imprisonment, in its general sense, is the restraint of one's liberty. As a punishment it is a restraint by judgment of a court . . . and is *personal* to the accused. It is a thing self-evident, therefore, that the death of a person upon whom such a judgment is imposed would put an end to an *infliction or enforcement of the punishment*. A fine being a pecuniary punishment imposed upon the person, it would seem that a like result would follow. If the accused should die before the punishment was in reality enforced or inflicted, *he could not be pecuniarily mulcted or punished in person after he had ceased to exist*. In passing judgment, whether imprisonment or fine, it is the purpose of the court and the law that the accused be personally punished for the amendment of his life and of his deportment in the future, and to deter others from committing like offenses. . . . If the fine is made out of his property, then as to that he is punished; but, if made out of the property that has descended to his heirs . . . then it would seem he is

not punished, for *his day of temporal punishment has passed*. It is, perhaps, within the power of Congress to constitute a fine a debt due from the accused in the same relation as an ordinary debt, so that his estate, in case of his death, would be beholden . . . But this it has not done, nor attempted to do. It has provided merely a process for the enforcement of the fine as a fine but not as a debt."

Then quoting from *United States v. Pomeroy*, 152 Fed. 279, the court continued (1017):

"It (the fine) was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but, upon his death, *there is no justice in punishing his family for his offense*."

And if a prosecution under a federal criminal statute is not given survival by some act of Congress, it abates upon the death of the accused *regardless* of state statutes of survival. In *Schreiber v. Sharpless* (1883) 110 U.S. 76 (80) Sharpless was sued for penalties under a federal statute governing patent infringements. He died before judgment. Continuance of the action against his estate was attempted and denied. The Supreme Court said:

"The suit was not for . . . damages . . . but for penalties . . . recoverable under the Act of Congress. . . . At common law actions on penal statutes do not survive, and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. Whether an action survives depends on the *substance* of the cause of action, not on the forms of proceedings to enforce it. As the nature of penalties and forfeitures imposed by acts of Congress and *cannot be changed by state laws*, it follows that state statutes allowing suits on state penal statutes to be prosecuted after the death of the offender, *can*

have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress."

The above case has not been overruled or departed from in its ruling so far as we are aware. It has been cited in later cases including *United States v. Safeway Stores* (1944) 140 F. (2d) 834 (840) C.A. 10. In *Bowles v. Farmers National Bank* (1945) 147 F. (2d) 425 (430) C.A. 6 it was said:

> "The question of the survival of the action, which . . . is purely the creature of congressional enactment, *is not governed by state statutes of survival.* In the absence of an act of Congress, the federal courts are entitled to apply the proper rules of federal law under their own standards. Under federal law an action for penalties and forfeitures recoverable under Congressional enactment does not survive, but abates with the death of the claimed violator of the statute."

(3) The Main Objective of Criminal Punishment Was Attained by Petitioners' Dissolutions and Abatement of Their Prosecution thereby Will not Offend Public Policy.

Since the fine in a criminal prosecution is punishment only, and personal to the offender, it becomes germane to see what the legitimate aim of such punishment is. In *Hopt v. Utah* (1884) 110 U.S. 574, this Court said (579):

> "The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offense of the same kind."

More recently in *Williams v. New York* (1949) 337 U.S. 241 this Court said (248):

> "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

It is submitted that these goals have been attained when the corporate offender has been dissolved. Its dissolution has made future crimes by it impossible. What then is the purpose of the fine? If it stands, it must be made out of the stockholders and that situation brings to mind what was said many years ago in *Felton v. United States* (1877), 96 U.S. 699 (703):

> "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone."

It also brings to mind what was said in *United States v. Mitchell*, supra, (quoting from the *Pomeroy* case) about collecting a fine from the *estate* of the person on whom it was imposed:

> * * * there is no justice in punishing his family for his offense."

The record shows that these three Petitioners were dissolved on May 2, 1955, for commercial and legal reasons independent of the indictment (R. 20, 24, 31). The record shows that their parent corporation and sole stockholder, Schenley Industries, Inc., was indicted along with them (R. 2, 46). The record shows that an officer of each of Petitioners was indicted along with them (R. 5). In view of *Section 24, Title 15, U.S.C.A.*, supra, (added to the Anti-trust laws in 1914) under which individual directors, officers or agents of a corporation can be punished for the corporation's violation of those laws, there can be little plausibility and even less merit, to any contention that public policy would be offended if dissolution of the corporation abated a Federal Anti-trust criminal proceeding against it. If public policy looks to prevention of further criminal acts *by the dissolved corporation*, it is satisfied completely,

for its dissolution ends the possibility of any further offense by it. If public policy looks to prevention of similar offenses *by other corporations* the statute just referred to (*Sec. 24, Title 15, U.S.C.A.*) accomplishes that purpose much more effectively that the prosecution of an individual noncorporate offender could ever do, because in *every* case of a *corporate* offender that statute not only multiplies the prosecutions and punishments possible from one and the same violation, by the number of directors, officers and agents which the offending corporation has, but provides for their *imprisonment* as well as fine upon conviction — punishment greatly in excess of that which could be visited upon the corporation itself as the principal offender. If public policy looks to punishment of the dissolved corporation, punishment cannot be visited upon a dead corporation any more than upon a dead person and the opinion of the court in *United States v. Mitchell*, 163 Fed. 1014 (1017), supra, may well be paraphrased by saying:

"*Its* day of temporal punishment has passed."

It can hardly be contended that public policy looks to the collection of criminal fines as a revenue raising activity on the part of the Government, distinct from the aim of punishment and prevention of crime, but if such contention were to be made the answer would be a reference to *Sec. 24, Title 15, U.S.C.A.* under which *multiple* fines can be imposed for the single *corporate* violation, whereas only *one* can be collected for the single individual *noncorporate* violation. How then can it be said that public policy would be offended if dissolution of a corporation abated the criminal prosecution against it? In the final analysis, the public policy of the *state in which was created the particular corporation* must govern, for its law alone prescribes for how long and upon what terms its corporate creature

exists. In *Northern Pacific R. R. Co. v. Meese* (1915), 239 U.S. 614, this Court said (619):

> "It is settled doctrine that Federal Courts must accept the construction of a state statute deliberately adopted by its highest court."

(4) The Pertinent Maryland Statutes Abate Criminal Prosecution of a Dissolved Corporation.

Petitioners, Melrose and CVA, were Maryland corporations and dissolved under its laws on May 2, 1955 (R. 15, 26).

The pertinent sections are short enough to repeat them here for more convenient reference. *Sec. 72(b), Article 23, Annotated Code of Maryland* (1951) (now 76(b)), provides:

> "The dissolution of the corporation shall be effective when the Articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any *existing* debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs."

Sec. 74(b), Article 23, id. (now Sec. 78(b)) throws light on the meaning of the preceding section 72(b). It refers to the duties of the directors of a dissolved corporation as trustees for the purposes of liquidation, unless and until a receiver is appointed, and says in its pertinent parts:

> "They shall proceed to collect and distribute the assets of the corporation, applying such assets to the extent available to the payment, satisfaction and discharge of *existing* debts and obligations of the corporation, including necessary expenses of liquidation, and distributing the remaining assets among the stockholders. Etc. Etc."

Sec. 78(a), Article 23, id. (now Sec. 82 (a)) provided (prior to 1957):

> "The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed upon them by law; nor shall such dissolution abate any *pending suit or proceeding* by or against the corporation, and all such *suits* may be continued with such substitution of parties, if any, as the court directs. No receiver shall institute suit except by order of the court appointing him; such suit may be brought in his own name as receiver or, notwithstanding its dissolution, in the name of the corporation, to his use."

No cases have been found which interpret the foregoing Maryland statutes with respect to the Question Presented.

The first two sections above quoted clearly say that after dissolution a Maryland corporation exists *only* to satisfy and discharge its *existing* debts and obligations and to liquidate and *wind up its affairs*. It is significant that the word "existing" is applied in *both* sections to the phrase "debts and obligations". The third section above quoted (Sec. 78(a) (now Sec. 82(a)) says that the dissolution shall not abate any pending *suit or proceeding* by or against the corporation and all such *suits* may be continued with such substitution of parties, if any, as the court directs. These three sections must be read in *pari materia* under familiar rules of statutory construction. It is the first two sections which ordain the *sole purposes* for which the corporation exists after dissolution. The third section, read in the light of the first two, can only have reference to *pending suits or proceedings to judicially determine corporate liability to compensate some obligation existing at the time of the corporate dissolution*. If the third section be not thus limited in meaning then it is in conflict

with the first two sections to the extent that it would permit an adjudication against the corporation wider than the statutory purpose of its continued existence. An "existing debt and obligation" within the meaning of the first two sections can only mean, of course, "existing at the date of the corporate dissolution". It will be recognized that the dissolved corporation could have an "existing obligation" to *remedy* or *compensate* a pre-existing claim of another even though such claim be not yet judicially determined. Applicable here in full force is the prior discussion in this brief of the fundamental difference between the nature and purpose of criminal prosecution and remedial or compensatory suits. The issue in the criminal case is not that of "remedy" to anyone but of "guilt or innocence." When the criminal fine is imposed it is "punishment" not compensation for any underlying obligation. The finding of guilt relates to the wrongful act but the fine, being in the discretion of the court and being punishment and not compensation, has no existence until imposed. Therefore, under the quoted Maryland statutes read in pari materia a criminal prosecution cannot be embraced within the term "pending suit or proceeding" in Sec. 78(a). Any other construction conflicts with the first two sections (Sec. 72(b) and 74(b)) since a criminal fine imposed after the corporate dissolution is not an "existing debt or obligation" of the corporation at the time of its dissolution.

While the Maryland statutes, applicable to the Question Presented (with respect to Melrose and CVA, the Maryland corporations) stood at all pertinent times as above set forth, yet changes occurred in them in 1957 which are mentioned here solely insofar as they throw light on what those statutes meant before the changes. By *Sec. 11, Chapter 399, Acts of the General Assembly of Maryland 1957*, Sec. 78(a) (now 82(a)) above quoted, was amended

by deletion of everything after the semi-colon therein, so that the section, as amended, read:

> "The dissolution of a corporation shall not relieve its stockholders, directors, or officers from any obligations and liability imposed upon them by law."

thus omitting "nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued * * *" (R. 58-59). The same legislature then enacted *Rule 222 of the Maryland Rules of Procedure for the Court of Appeals and Appellate Judicial Circuits of Maryland*, which read:

> "An *action* by or against a corporation shall not abate by reason of the dissolution, forfeiture of charter, merger, or consolidation of such corporation. Such action may be continued with such change of parties as the court may direct."

The net effect of the change was the replacement of the terms "suit or proceeding" and "suits" by the single word "action". However, the further significant fact appears to be that Rule 222 applies only to *civil* actions since the rules pertaining to *criminal* prosecutions commence at Rule 701.

Even the *Collier* case (*United States v. Collier* (1953 C.A. 7), 208 F. (2d) 936, 939), holding, contrary to Petitioners' contention, that dissolution does not abate criminal prosecution of a Delaware corporation) agrees that the word "action", standing alone, might reasonably be held as *not* including a criminal prosecution.

(5) The Pertinent Delaware Statute Abates Criminal Prosecution of a Dissolved Corporation. The Collier Case Discussed.

The Petitioner, Dant, was a Delaware corporation and dissolved under its laws on May 2, 1955 (R. 22).

Here again, the appropriate statute is short enough to be repeated here, in its pertinent parts, for handier reference. *Sec. 278, Title 8, Delaware Code 1953* provides:

> "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such * * * dissolution, bodies corporate for the purpose of prosecuting and defending *suits* by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any *action, suit, or proceeding* begun or commenced by or against the corporation prior to the * * * dissolution * * *, the corporation shall, only for the purpose of such *actions, suit, or proceedings* so begun or commenced, be continued bodies corporate beyond the three-year period and until any *judgments, orders, or decrees* therein shall be fully executed."

Sec. 281, Title 8, id., while not directly involved, throws light on the meaning of Sec. 278 because it provides what the trustees or receivers of a dissolved corporation shall do with its assets and its language would forbid payment of a criminal fine levied against the corporation *after* its dissolution. *Sec. 281, Title 8*, reads, insofar as here pertinent:

> "The trustees or receivers of a dissolved corporation, after payment of all *allowances, expenses and costs*, and the satisfaction of all *special and general liens* upon the funds of the corporation to the extent of their lawful priority, shall pay the other *debts due from the corporation*, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose. If

there shall be any balance *remaining after the payment of the debts and necessary expenses*, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives."

Both of these sections are part of the Delaware law dealing with dissolved corporations and must be read in *pari materia*. So read, their preponderating rationale is that criminal prosecution of the defunct corporation is excluded from the purpose of its "after-life". The terms "allowances, expenses and costs", "special and general liens", and "debts due from the corporation", certainly do not embrace criminal prosecutions or fines assessed *after* the dissolution.

No cases have been found wherein Delaware has interpreted her own corporate dissolution statutes with respect to the Question Presented. However, those statutes have received interpretations on that point in several of the Federal Courts of Appeal, and there is conflict among them. Taking up these cases in order of their priority, the first is *United States v. Safeway Stores, et al.* (1944), 140 F. (2d) 834 C.C.A. 10, in which a Delaware corporation and others were indicted under the Sherman Act. It, and four other corporate defendants, had dissolved just a few days prior thereto. Motions to dismiss were filed on behalf of each, predicated upon the dissolutions. The District Court granted the motions. The Court of Appeals considered the appropriate Delaware statute, which continued existence of dissolved corporations for the purpose of defending "suits" by or against them, and held that a criminal prosecution was not included. However, the equivalent California statute, also before the court, used the term "action or proceeding", and the court held that a criminal prosecution was not therein embraced. Thus, between the

two statutes, the court considered the terms "action, suit and proceeding" which cover the wording in Sec. 278 of the Delaware statute here under consideration. The opinion commends itself as well considered and persuasive. In arriving at its holding the court noted, among other things (840):

> "The death of an individual and the administration of his estate, and the dissolution of a corporation and the winding up of its affairs, are the same in principle."

The next case came along some eight years later. In *United States v. Line Material Co.* (March 1953), 202 F. (2d) 929, C.A. 6, a Delaware corporation was indicted under the Sherman Act in November 1948. It was dissolved by merger in July 1949. In May 1952 it moved to dismiss because its corporate existence had terminated. At that time the Delaware statute contained the words "action, suit or proceeding" as it does in the section here under consideration. The District Court granted the motion to dismiss. The Court of Appeals affirmed and held for reasons stated in the opinion that criminal prosecutions were not embraced in the quoted term.

Later in the same year came *United States v. P. F. Collier & Son* (Dec. 1953), 208 F. (2d) 936, C.A. 7, which held *directly contrary* to C.A. 10 and C.A. 6 on the same question. There a criminal information was filed against a Delaware corporation for an alleged violation of the Fair Labor Standards Act. A motion to dismiss was filed on the ground that the corporation had previously dissolved in the same year. The District Court granted the motion but the Court of Appeals reversed and held that the words "any action, suit or proceeding" as contained in the Delaware statute (940):

> ". . . embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty."

It is submitted that the decision is erroneous for two reasons, the *first* of which is that the court failed to recognize the fundamental distinction between "criminal" liability and "civil" liability. This is evident from such language in the opinion as (940):

> ". . . We see no reason why by the same token its *liabilities, both civil and criminal,* are not also preserved."

and (940):

> ". . . if dissolution . . . works no extinguishment of a legal right, we discern no reason why it works an extinguishment of a *legal liability, whether civil or criminal.*"

and (940):

> ". . . no sound reason occurs why a legislature would intend to relieve a dissolved corporation of its *criminal liability* and at the same time preserve its *civil liability.*"

What *civil liability* is presents no problem. It is the obligation to compensate a just claim — tort, contract or statutory. But what is this *criminal liability* which the *Collier* opinion has placed on equal footing? It is not an obligation to compensate, for the issue in the criminal case is not liability to compensate but simply "guilt or innocence" of a public offense. There *can* be no "criminal liability" of the accused at the time of the indictment, for the presumption of innocence attends him then and thereafter until he is duly adjudged guilty. Even at *that* time there is no "criminal liability" resting upon him *unless* and *until* the court imposes some form of punishment which, as has been shown, is in the discretion of the court and can have no existence until imposed, and when imposed, can have no retroactive effect precisely because it *is* punishment and *not* compensation. Speaking of "liability" as used in a

criminal statute, this Court said in *United States v. Reisinger* (1888), 128 U.S. 398 (403):

> ". . . this word 'liability' is intended to cover every form of *punishment* to which a man subjects himself, by violating the common laws of the country."

and in *Lovely v. United States* (1949), 175 F. (2d) 312, C.A. 4, cert. den. 338 U.S. 834, the court quoted with approval (317):

> "and 'liability' and 'forfeiture' are synonymous with 'punishment' in connection with crimes. . . ."

It is clear, therefore, that the term "criminal liability" can only mean *punishment* and since there had been none imposed in the *Collier* case at the time of the corporate dissolution there, the court was in error in treating it as something in existence to be "preserved" by the statute. The *second* reason for suggesting that the *Collier* decision is in error was the failure of the court in that case to apply the rule of *ejusdem generis* in construing the statutory phrase "action, suit or proceeding" in Sec. 278 of the Delaware Corporation Law. It was the word "proceeding" in that phrase which alone induced the court to hold that criminal prosecutions were included. *This is apparent from the following language in the opinion* (939):

> "We agree that the word 'suit' or the word 'action' standing alone might reasonably be held as *not* including a criminal prosecution. . . ."

Thus, in construing a state statute the court had before it in the *Collier* case two words "suit" and "action" (which the court agreed suggested only civil matters) followed by the broader word "proceeding". The rule of *ejusdem generis* exists in the law to help construe doubtful phraseology in just such a case. In *Chichester Chemical Co. v. United States (1931)*, 49 F. (2d) 516 C.C.A.D.C. it was said:

> "When an author makes use, first, of terms each evidently confined and limited to a particular class of a

known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things of 'ejusdem generis' — that is, of the same kind or species — with those comprehended by the preceding limited and confined terms."

In *Goldsmith v. United States* (1930), 42 F. (2d) 133, C.C.A. 2, cert. den. 282 U.S. 837, it was said (137):

> "The rule of ejusdem generis means that, where a general term in the statute follows specific words of a like nature, it takes its meaning from the latter, and is presumed to embrace persons or things of the kind designated by the specific words."

In *Phillips v. Houston National Bank* (1940), 108 F. (2d) 934, C.A. 5, it was said of the rule of ejusdem generis:

> "It serves to prevent general words, loosely used in connection with specific terms, from extending the operation of the instrument into a field not really intended."

The rule is related to the rule *"noscitur a sociis"* and sometimes the terms are used interchangeably although in a technical sense it is a limited or specific application of *noscitur a sociis*. In *Fitch v. United States* (1945), 323 U.S. 582, this Court applied the rule of ejusdem generis in holding that the term "a transportation, delivery, insurance, installation, or other charge" as used in the statute, did not embrace an advertising and a selling charge which, the Court said, were dissimilar in nature to the specific charges enumerated just before the term "or other charge". In *Haberman v. Equitable Life Insurance Society* (1955) 224 F. (2d) 401 C.A. 5, cert. den. 350 U.S. 948, the question was whether, in a Texas statute defining what was included in the term "security or securities", the words "investment contract" included an insurance annuity. The court held it did not. It said (405):

"The rule of construction that the meaning of statutory words is to be determined by their context, or noscitur a sociis, should be applied in determining the meaning of 'investment contract' in the Texas act. These words having *no fixed technical significance*, their meaning must be ascertained from the specific terms in connection with which they are used; that is, they should be interpreted as referring to instruments of the *same general type* as the specifically enumerated ones. It seems certain to us that the legislature meant by this language to give color and scope to the specific terms, and to fill in any interstitial loopholes in the area staked out, so to speak, by the specific terms; not to extend that area radically so as to include quite dissimilar things which have precise and well known names which the legislature could easily have included expressly had it wished to do so. * * *. While annuities are sometimes called investments, that is not an apt characterization."

It is submitted that if the court in the *Collier* case had applied the rule of ejusdem generis, a different result would have been reached there and in the case at hand.

Before leaving the *Collier* case, adverse comment is due with respect to three references made therein to justify the decision in that case (that "action, suit or proceeding" in *Sec. 278, Delaware General Corporation Law* (supra) includes criminal prosecutions). *First*, there was reference to the fact that in the *Federal Rules of Criminal Procedure* a prosecution is uniformily referred to as a "proceeding". It is not perceived how the choice of a word by the rule makers in the comparatively recent (1946) *Federal Rules of Criminal Procedure* could have the remotest bearing on the meaning of a word or phrase in a completely unrelated Delaware statute. One is moved to add that after the Federal Rules of *Civil* Procedure came out, it was only logical to designate the later rules of

criminal practice as the Federal Rules of *Criminal* Procedure. Second, there was reference to *Bahen & Wright v. Com'r* 176 F. (2d) 538 C.A. 4. But that case was not a criminal case. It involved *administrative proceedings* to collect federal taxes which had accrued during the life of a Delaware corporation. Since there could be considerable doubt as to whether administrative proceedings would fit under the label of either "suit" or "action", the case illustrates a sound reason for use of the word "proceeding" in the statute (in addition to the words "suit" and "action") other than forcing inclusion of criminal cases or prosecutions. *Third*, there was reference to *Addy v. Short*, 8 Terry 157 (Del.) 89 A. (2d) 136, but this, again, was not a criminal case. It held that dissolution of a Delaware corporation (and expiration of the three year winding up period) did not extinguish a possibility of reverter held by the corporation. It is submitted that none of those references was apposite to the decision which it was cited to support.

The next case was *United States v. United States Vanadium Corporation, et al.* (1956), 230 F. 2d 646, C.A. 10, cert. den. 351 U.S. 939. On September 2, 1948, a criminal antitrust information was filed against a Delaware corporation which pleaded "not guilty". Thereafter in September, 1950, its corporate existence was terminated and a motion was filed to dismiss the information on that ground. The District Court granted the motion (sub nom *United States v. Union Carbide Corporation*, 132 F. Supp. 388) and it was affirmed by C.A. 10, which said (230 F. 2d 649):

> "Since the circuits are not in agreement as to the law of Delaware and until the Supreme Court has spoken, we adhere to the law as declared in the Safeway case. . . ."

As indicated, this Court denied certiorari.

Finally, in August 1958 came the decision which is here appealed from, *Melrose Distillers et al v. United States* (1958) 258 F. (2d) 726 C.A. 4, which so completely espouses the *Collier* case that it shares its infirmities and makes unnecessary further comment here.

(6) New York has Construed "Action, Suit or Proceeding", in a Distantly Related New York Statute, to Exclude Criminal Trials.

In *Schwarz v. General Aniline & Film Corp.*, (1953) 305 N.Y. 395 113 N.E. (2d) 533, Schwarz, an officer and director of General Aniline, etc., was indicted with it and others for violation of the Sherman Anti-trust Act. He pleaded "nolo contendere" and was fined. *Section 64 of the General Corporation Law of New York* was described in the opinion of the Court of Appeals of New York (113 N.E. (2d) 535) as follows:

> "* * * Section 64 * * * contains broadened provisions for assessment against a corporation, of the expenses of any person who is made a party to '*any action, suit or proceeding*' because of his being an officer, director or employee, unless he shall have been adjudged that he was liable for neglect or misconduct in the performance of his duties."

Schwarz brought an action for assessment against the corporation of his expenses in the anti-trust case. The court held that the phrase "any action, suit or proceeding" did *not* include a criminal matter. Said the court (536):

> "We note, too, that the quite similar New Jersey, Kentucky and Delaware statutes * * * all include the same verbiage: 'action, suit or proceeding', and it is not claimed that any of those statutes have ever been held to contemplate * * * criminal trials. Our own conclusion is that the draftsman who was responsible for the statutory language, 'any action, suit or pro-

ceeding' was being overcautious in making sure that the law would apply in an 'action' at law, a 'suit' in equity, or a special 'proceeding'."

(7) The "Spark-of-Life" Theory Untenable.

It was Respondent's theory in the Court of Appeals that so long as a dissolved corporation retained any life for any purpose, it was amenable to prosecution under the Sherman Act because of *Sec. 7, Title 15, U.S.C.A.* (supra). It is submitted that the section simply means that corporations and associations, whether Federal, State, Territorial or Foreign, can be guilty of violating the Sherman Act, as well as natural persons. No case has been found which forces upon this section strained meaning ascribed to it by Respondent.

Furthermore, Respondent's "spark-of-life" theory is counter to the principle in *Chicago Title and Trust Co. v. Wilcox Building Corp.* (1937) 302 U.S. 120. In that case the question was close to the Question Presented here. It was whether a dissolved Illinois corporation, which still had a very limited existence under state law, could avail itself of the Federal Bankruptcy Act. The lower court held "yes". This Court said "No", and that although the corporation still had a spark of life it was not sufficient to permit it to file a petition under the Bankruptcy Act. Mr. Justice Cardozo wrote a *dissenting* opinion (302 U.S. 130-134). In it he pointed out that the Federal Bankruptcy Act was available to *"any corporation"* and that under its definitions *"corporations"* meant *"all bodies having any of the powers and privileges of private corporations"*. He pointed out that the corporation there involved still had corporate powers, although limited. As he put it, *"a fragment of the corporate power was thus untouched*

by dissolution" and, *"Here the state has elected to keep the corporation in existence, maimed but still alive."* He went on to say that this was enough to bring it within the reach of the Federal Bankruptcy Act. Further, he said that it was not within the competence of the state to preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law. This dissenting opinion largely, if not wholly, embraces Respondent's contention under *Sec. 7, Title 15, U.S.C.A.* But it did not become the law.

CONCLUSION

It seems appropriate to say in conclusion, with respect to Delaware particularly, that corporations in vast number are organized and existing under its laws. Respondent says in its Memorandum filed in this court to the Petition for Certiorari in this case:

> "A substantial, if not the major, number of corporate defendants in Sherman Act cases are Delaware corporations * * *."

From this conceded fact the inference arises that Delaware is at all times keenly aware of the interpretations which her corporation statutes are receiving in other jurisdictions. From the *Safeway* case, in 1944 until the decision here appealed from in 1958, the majority holding in the federal courts of appeals on the question was that federal criminal prosecution of a Delaware corporation was abated by its dissolution under the Delaware statute. The logical assumption is that if Delaware did not view her own statute in the same light, she would have amended it to nullify such holding.

It is respectfully submitted that as to each of the Petitioners, its fine should be set aside, its conviction reversed and the indictment dismissed, by the appropriate order, judgment or mandate of this court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

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MELROSE DISTILLERS, INC., CVA CORPORATION AND DANT DISTILLERY AND DISTRIBUTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

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The use of *italics* herein is for emphasis unless otherwise indicated. References to Petitioners' main brief will be (Pet. Br.); to Respondent's brief (Resp. Br.) and to the record (R.).

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. Important Areas of Petitioners' Brief Are not Disputed.

In its brief Respondent nowhere challenges Petitioners' exposition of the fundamental difference in nature and purpose between a civil or remedial action and a criminal prosecution (Pet. Br. 10-13). This is worthy of note for

unless and until that difference is somehow reconciled or explained away (if it can be) it is very difficult to see how criminal fines imposed in 1958 on corporations dissolved in 1955 could be, at the time of such dissolutions, "existing debts and obligations" within the language of *Sec. 72(b) and 74(b), Article 23, Annotated Code of Maryland 1951* (Pet. Br. 21), or "debts due from the corporation" within the language of *Sec. 281, Title 8, Delaware Code 1953* (Pet. Br. 25).

Nor does Respondent, anywhere in its brief, disagree that the main objective of criminal punishment is not retribution or expiation, but prevention and reformation (Pet. Br. 18-19). This, too, may be worthy of note, because so long as the law remains that a corporation is a separate legal entity, capable of committing a crime and owning its own property, it can hardly be denied that its dissolution either fully attains, or renders moot, those objectives, so far as the particular corporation is concerned. Insofar as the objective is prevention of crime by *others*, Congress *more* than met that need in the Anti-trust field in 1914 when it enacted *Sec. 24, Title 15, U.S.C.A.*, whereby a corporation's violation is ipso facto a violation by the participating directors, officers, or agents, each of whom may be fined or imprisoned (although the corporation can only be fined) (Pet. Br. 4). That section is conspicuously omitted in Respondent's brief. The spectres of personal fines (and imprisonment) facing corporate directors, officers and agents through application of that section are of a certainty, in all common sense and judgment, "deterrents of others" to a degree which a single fine imposed upon an erring corporation could never equal.

II. Respondent's Brief Seems to Overlook that a Corporation Is a Separate Entity from Its Stockholders.

Respondent asserts that the assets of a corporation go to its stockholders upon its dissolution (Resp. Br. 10). What is meant, of course, is "net assets". Therefore, Respondent reasons, "A fine levied on the dissolved corporation would thus affect and punish the same persons as before dissolution — the stockholders" (Resp. Br. 6 and 10). This logic is based upon the faulty premise that a fine levied upon a corporation affects and punishes its stockholders, and that the stockholders are continuously the same persons. It ignores (1) that the corporation is a separate entity from its stockholders; (2) that the corporation (not its stockholders) owns its property, and (3) that stockholders (who may be different persons from day to day) are not punishable for crimes of the corporation. In *Pierce v. National Bank of Commerce* (1926, C.C.A. 8), 13 F. (2d) 40, cert. den. 273 U.S. 730, the court said (47):

> "The general doctrine is well established that a corporation is a legal entity distinct from its individual members or stockholders, and that the property or rights acquired or the liabilities incurred by the corporation are the property, rights, and liabilities of such legal entity as distinguished from the members who compose it."

In *American Medical Ass'n. v. United States* (1942, C.A. D.C.), 130 F. (2d) 233, aff'd. on other grounds, 317 U.S. 519, the Court of Appeals said (253):

> "When a corporation is guilty of a crime it is because of a corporate act, a corporate intent; in short, corporate commission of crime. The fact that a corporation can act only by human agents is immaterial. How separate is the identity of the corporate person and the individual person, where criminal liability is concerned,

is shown by the fact that a corporation may be found guilty of a crime, the essential element of which is a specific criminal intent."

In *Klein v. Board of Supervisors* (1930), 282 U.S. 19, this Court said (23):

> "There is no doubt that a state may tax a corporation and also tax the holders of its stock. The *owners* are different and . . . the *property* is different."

and (24):

> "The appellant, pursuing *his notion that shares of stock represent an interest in the property of the corporation*, insists that if taxed at all he should be taxed only in the ratio of the property in the state to the entire property of the corporation; that to tax him for the whole value is to tax property outside of the jurisdiction of the state. But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The *corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members.*"

See also *Bird v. Wilmington Society of Fine Arts* (1945 Sup. Ct. of Del.), 43 Atl. (2d) 476 (483).

Infliction of punishment on stockholders for a crime committed by the corporation would "*shock the sense of justice of everyone*" as indicated by this court many years ago (Pet. Br. 19).

III. More about the Equation of an Individual's Death to a Corporation's Dissolution.

The equation or analogy referred to was drawn by this Court and its accuracy, property-wise, is expounded in our main brief (Pet. Br. 13-18). But, says Respondent, this analogy has not been the subject of universal admiration

(Resp. Br. 9). However, this Court has not repudiated it in whole or in part, not even when commenting that it lacked "universal admiration" (*Defense Supplies Corp. v. Lawrence Warehouse Co.* (1949), 336 U.S. 631 (634). Respondent argues that "Criminal actions abate upon the demise of an individual *because* . . . a fine would punish the . . . heirs *and* . . . the defendant is no longer able personally to defend. . . ." (Resp. Br. 10). To this statement we agree, after adding a *third* reason, to wit, "because the issue of guilt or innocence (which is the sole issue in a criminal case) became moot upon defendant's death." But Respondent's argument from there is to the effect that since a corporation is an instrumentality of its stockholders, a fine imposed upon it is in effect imposed upon the stockholders whether before or after corporate dissolution (Resp. Br. 10). But we have hereinabove illustrated the error of this argument by reference to *Klein v. Board of Supervisors, supra.* Because the corporation is in law a separate entity from its stockholders, and owns its own property in which the stockholders have no interest until the corporation is dissolved (just as the heir has no interest in the property of his ancestor until the ancestor dies) it is clear that the reasons advanced by Respondent why a criminal action abates upon the demise of a natural person are equally applicable to abate the criminal action upon dissolution of the corporate person. Respondent goes on to say that the *stockholders* of the dissolved corporation can retain counsel and defend the corporation against criminal charges as well after dissolution as before (Resp. Br. 10). Here again Respondent ignores the separate entity of the corporation from its stockholders. Here again Respondent ignores that the issue of guilt or innocence becomes moot with the death of the defendant in a criminal case — natural or corporate. No reason is advanced why stockholders

should defend a moot issue on behalf of their dissolved corporation any more than the heirs should defend a moot issue on behalf of a deceased ancestor, since it is clear that neither the stockholders in the one case nor the heirs in the other were punishable for the criminal act of the corporation or the ancestor. If, as Respondent concedes (Resp. Br. 10) levying the fine would punish the *heirs* of the *individual* defendant, then by the same token it would punish the stockholders of the dissolved corporation notwithstanding their non-liability for the crime for which the fine was imposed.

IV. Public Policy

Petitioners affirm their argument on this point (Pet. Br. 19-21), especially in the light of *Sec. 24, Title 15, U.S.C.A.* added to the anti-trust laws in 1914 (Pet. Br. 4).

Respondent suggests that Petitioners' corporate parent Schenley Industries, Inc., *could* employ subsidiary corporations to violate the law and then through the device of voluntary dissolutions, elude penalties imposed for their criminal acts (Resp. Br. 12). This hardly rises to the dignity of requiring a reply. Suffice it to say that if such a situation ever became a reality, Schenley would not be shielded, for the use of subsidiary corporations to violate the law is an effective and long established legal reason for looking through the corporate entity. In the case at hand let it be remembered that the dissolutions of Petitioners were for commercial and legal reasons independent of the indictment (Pet. Br. 8; R. 20, 24, 31), a fact established by the record which Respondent does not deny.

Respondent says (Resp. Br. 11) that public policy is seriously offended by the abatement of a criminal prosecution on dissolution of the corporate offender "where th

corporate dissolution has little or no significance and the same stockholders retain control over the corporate assets and continue the business through the medium of a different corporation, or a partnership or other unincorporated entity." Even if the situation, which Respondent assumes, existed by the record in this case, yet Respondent's argument completely ignores the separate corporate entity of the violator and assumes that the stockholders are ipso facto punishable for the crimes of the corporation. There is nothing in the record or within the narrow scope of the question before this Court to remotely support Respondent's implication that any corporate entity should here be ignored. The fact that the assets of the dissolved corporation may be used in the business of the transferee stockholder, or a different corporation — in either case in the hands of another entity — carries no implication of illegality and certainly no reason why the acquirer should be punished for the crime of another, although if any such *successor* violated the law it would be amenable to punishment for its *own* misdeeds. Respondent might as well argue that an heir who inherits assets from, and continues the business of, an ancestor is by that fact punishable for a crime committed by the ancestor.

Before leaving this phase of Respondent's argument which it calls "policy considerations" (Resp. Br. 13) the question arises as to "*whose* policy considerations". We are persuaded by a decision of this Court that they are the state's, notwithstanding Respondent's quotation from *Alamo Fence Co. v. United States*, 240 F. (2d) 179, 183, C.A. 5 (Resp. Br. 10-11) dealing with a Texas statute. In *Chicago Title and Trust Co. v. Wilcox Building Corp.* (1937), 302 U.S. 120, this court said (127-128):

> "*How long and upon what terms* a state-created corporation may continue to exist is a matter *exclusively*

of state power (Cases). The *circumstances* under which the power shall be exercised and the *extent* to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the Federal Government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it *with such limitations as the legislature sees fit to annex* (Cases). And since the Federal Government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state *attaches qualifications to its sentence of extinction nothing can be added to or taken from* these qualifications by federal authority."

Because it clearly flies in the face of this language, we examine Respondent's argument as to the Delaware Statute (Resp. Br. 13-19).

V. The Delaware Statute

Respondent centers its argument (Resp. Br. 13-18) on *Sec. 278, Title 8, Delaware Code 1953* (Resp. Br. 3; Pet. Br. 5 and 25), and devotes less than a page (Resp. Br. 18-19) to the companion Section 281 (Resp. Br. 28-29; Pet. Br. 25-26). Yet these two sections must be read together dealing as they do with the same subject. Section 281 prescribes the uses to which the assets of the dissolved corporation shall be put. These are qualifications imposed by Delaware with respect to the dissolution of a Delaware corporation.

If the voice of this court in *Chicago Title and Trust Co. v. Wilcox etc., supra,* be heeded, *"nothing can be added to or taken from those qualifications by federal authority"*. Section 281 enumerates these uses and, under familiar rules of statutory construction, such enumeration eliminates all uses not included. The enumerated uses are: (1) payment of all allowances, expenses and costs and the satisfaction of all special and general liens upon the funds of the corporation; (2) payment of the other debts due from the corporation; (3) distribution of any balance among the stockholders. Plainly (1) and (3) are out of the discussion. In (2) the term "debts due from the corporation" can only have reference to some claim for compensation existing against the corporation (whether contractual, tortious or statutory in nature) *at the time of its dissolution* (although perhaps not then adjudicated or liquidated). A criminal fine imposed over two years after the corporate dissolution, being punishment and not remedy, has no existence until imposed (Pet. Br. 10-13) and is certainly not a debt due from the corporation *at the time of its dissolution* in any sense of the word. It seems, therefore, that Section 281 imposes a restriction on Section 278 which would limit the "actions, suits, or proceedings" permitted against a dissolved corporation to those to establish the liability within one or more of the classes described in Section 281. It is submitted that those classes exclude criminal fines levied subsequent to the dissolution.

Respondent relies heavily upon *United States v. P. F. Collier & Son*, 208 F. (2d) 936 C.A. 7, to support its theory that dissolution does not abate the criminal prosecution of a Delaware corporation. Petitioners' reasons for believing the *Collier* decision to be wrong have already been fully expounded (Pet. Br. 27-32) with differentiations of *Bahen & Wright v. Com'r.*, 176 F. (2d) 538 C.A. 4, and *Addy v.*

Short, 47 Del. 157, mentioned in the *Collier* case (Pet. Br. 32). If the *Collier* case is wrong, District Court cases which followed it will little support Respondent's position. Cases speaking of civil and criminal liability in the same breath and assuming them to be equals in nature have overlooked the inherent difference in nature and purpose which necessarily separates them. Such a case is *United States v. Western Pa. Sand & Gravel Ass'n.* (1953 D.C. Pa. W.D.); 114 F. Supp. 158, 160 (cited in Resp. Br. 11). Petitioners have pointed out this distinction with the aid of decisions of this Court (Pet. Br. 28-29) and it is clear that the term "criminal liability" means "punishment" and has no existence prior to imposition of punishment.

Respondent argues (Resp. Br. 15-16) that the word "proceeding" in the Delaware statute governing dissolved corporations (which is strictly a civil, remedial statute) ought to embrace "criminal proceeding" because Delaware *Criminal* Statutes and both the Federal Rules of *Criminal* Procedure and the Rules of *Criminal* Procedure for the Delaware Superior Court refer throughout to "*criminal* proceedings". It occurs to us that references in these criminal statutes and rules to *criminal* proceedings lend force to Petitioners' theory that the bare word "proceeding" in a *civil* statute means only a civil proceeding.

This Court will note that on page 15 of Respondent's Brief, wherever "proceeding" or "procedure" is intended to relate to criminal matters, it is preceded by the word "criminal".

VI. The Maryland Statutes

There is nothing in Respondent's argument with respect to the Maryland statutes (Resp. Br. 19-22) which necessitates any change in or elaboration upon Petitioners' main argument on that subject (Pet. Br. 21-24). Sec. 72(b)

Article 23, Annotated Code of Maryland 1951 (Pet. Br. 4-5 and 21; Resp. Br. 29) prescribes the *sole purpose* for which a Maryland corporation exists after dissolution. If the language of this Court in *Chicago Title & Trust Co. v. Wilcox, supra,* is heeded, that purpose can not be enlarged to embrace a criminal fine imposed after dissolution, since it could not have been an existing debt or obligation of the corporation at the time of its dissolution.

Respondent cites *Diamond Match Co. v. State Tax Comm.* (1938 Md.), 175 Md. 234, 200 Atl. 365 (Resp. Br. 19) but the case did not involve a criminal prosecution and merely held that a statute enacted in April 1936, imposing a *retroactive* tax on corporations as of January 1936 was constitutional as to a corporation dissolved after that date but before the statute was passed. The liability for the tax was *civil* and since the legislature had power to make the tax retroactive — the liability was there at the date of dissolution.

VII. The Post-dissolution Existence of a State-created Corporation Is Limited to Such Purposes as the State May Specify.

The gist of Respondent's argument (Resp. Br. 23-26) is that if the state continues a corporate existence after dissolution for *any* reason at all, no matter how limited or restricted, it is sufficient to enable criminal prosecution under the federal Anti-trust laws, because (Respondent says) that is the meaning of *Sec. 7, Title 15, U.S.C.A.*[1] (This section appears in Pet. Br. 4; Resp. Br. 3).

It is submitted that Respondent's argument is diametrically opposed to the above quoted language of this court in *Chicago Title & Trust Co. v. Wilcox, et al., supra.* Further-

[1] This section is also Section 8 of the Sherman Act.

more, it is submitted that the theory of Respondent's argument on this point is largely, if not wholly, the theory of the *dissenting* opinion in *Chicago Title & Trust Co. v. Wilcox Building Co.*, 302 U.S. 130-134, which, persuasive tho it was, did not become the law. Petitioners' main brief carries further argument on this point (Pet. Br. 34-35).

CONCLUSION

The essential, fundamental difference in nature and purpose between a civil or remedial action and a criminal prosecution, or, to put it another way, between "civil liability" and "criminal liability" is embedded in our system of jurisprudence. It is one of the boundaries in the law. It is familiar to every student of the law. If it is lost or obscured by failure to recognize and enforce it, then uncertainty and confusion seep into the area which it once marked. It may be that in their desire to accomplish the widest possible enforcement of the Anti-trust laws and penalties, the representatives of the Government have not recognized that what they seek means, in this case, the pro tanto obliteration of a legal boundary. In *Gouled v. United States* (1921), 255 U.S. 298, this Court once said that the Fourth and Fifth Amendments to the Constitution should be literally construed (304):

> "... so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

In a measure, perhaps, some part of that language may be appropos here.

Furthermore, it seems to us that Respondent's contention that public policy will be seriously offended if a criminal anti-trust prosecution of a corporation abates upon its dissolution is lacking in weight in view of *Section 24, Title*

15, *U.S.C.A.* (printed in Pet. Br. 4) added to the Anti-trust laws in 1914. In fact, it was applied in the indictment in this case. An officer of each of Petitioners was indicted along with each Petitioner (R. 3-4-5). Under that section there can be multiple indictments for the corporate offence which remain standing should the corporation dissolve. Congress could have debated long before hitting upon a more effective deterrent to the very thing over which Respondent's counsel profess anxiety — dissolution and reincorporation.

For the reasons set forth above and in their main brief, the decision of the court below should be reversed as to each Petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1958

MELROSE DISTILLERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MEMORANDUM FOR THE UNITED STATES

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VICTOR R. HANSEN,
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CITATIONS

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 15-21) is not yet reported. The opinion of the district court (App. 43-82 [1]) is reported at 138 F. Supp. 685.

JURISDICTION

The judgment of the court of appeals (Pet. 22) was entered on August 29, 1958, and the petition

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[1] "App." refers to the printed appendix to appellants' brief in the court of appeals.

for a writ of certiorari was filed on September 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Delaware and Maryland corporation statutes, pending criminal proceedings abate upon the dissolution of a corporate defendant.

2. Whether the Maryland Alcoholic Beverages Law immunizes from the Sherman Act a conspiracy to fix prices of alcoholic beverages shipped in interstate commerce into the state of Maryland, and a conspiracy and an attempt to monopolize such commerce.

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

Section 278, Delaware General Corporation Law (Section 278, Title 8, Chapter 1, Delaware Code of 1953), provides in pertinent part:

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed.

Section 78(a), Article 23, Annotated Code of Maryland 1951, provides in part as follows:

> The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued

with such substitition of parties, if any, as the court directs. * * *.

STATEMENT

On April 6, 1955, an indictment was returned charging 14 corporate manufacturers, 7 corporate wholesalers, 3 trade associations, and 31 individuals, with conspiring to fix the wholesale and resale prices of alcoholic beverages shipped in interstate commerce into Maryland, and with conspiring to monopolize and attempting to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act (App. 1-14). The gravamen of the price-fixing conspiracy was a scheme, enforced by boycott, to compel manufacturers and wholesalers to establish "fair-trade" prices, and to compel retailers to observe such prices (App. 11).

Petitioners were 3 of the 14 corporate defendant manufacturers (App. 2).[2] Two of them were Maryland corporations; the third was a Delaware corporation.

On May 2, 1955—almost a month after the indictment was returned—petitioners were dissolved (Pet. 16). They then moved to dismiss the indictment on the grounds, *inter alia*, (1) that their dissolution abated the proceeding as to them; (2) that all of the acts charged were "permitted, sanctioned and encouraged" by the laws and policy of the State of Maryland; and that under the Twenty-First Amendment, such laws and policy preempted the

[2] They were wholly-owned subsidiaries of Schenley Industries, Inc., also a defendant corporate manufacturer (Pet. 4).

field of alcoholic beverage regulation, to the exclusion of the Sherman Act (App. 16, 23, 27, 35-43).

The district court denied the motions (App. 83). It ruled (App. 82) that "under the applicable Delaware and Maryland statutes, the corporate existence of the dissolved corporations continues to a sufficient extent to permit the prosecution of this criminal proceeding." The court also rejected the contention that Maryand law immunized petitioners from prosecution for the acts charged in the indictment (App. 50-71).

Petitioners (together with a number of other defendants) then pleaded *nolo contendere* and were fined. Petitioners appealed their conviction, on the grounds (1) that their dissolution abated the proceedings, and (2) that Maryland law immunized their conduct from Sherman Act liability.

The court of appeals unanimously affirmed. The court, noting that there is a "division of authority" among the circuits, held (Pet. 16-20) that the Delaware corporation statute, which provides for continuation after dissolution of "any [pending] action, suit, or proceeding," covers criminal proceedings. It further ruled (Pet. 20) that the Maryland statute "in all its essentials" is "of like effect"; and it stated (Pet. 18) that to accept petitioners' construction of those acts "would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequence of their criminal acts by the simple process of voluntary dissolution." The court also rejected, as "without merit,"

petitioners' contention that the acts and conduct charged were "permitted, sanctioned, and encouraged" by the law and policy of the state of Maryland (Pet. 20). The court ruled (Pet. 21) that neither the Maryland Alcoholic Beverages Law nor the Maryland Fair Trade Law "affords protection against prosecution for a conspiracy to fix prices 'horizontally' or a conspiracy to monopolize trade or an attempt to do so."

ARGUMENT

1. As petitioners point out (Pet. 7), the circuits are in conflict with respect to whether Delaware law provides for survival of pending criminal proceedings after dissolution of corporate defendants.[3] In the 1955 Term the Government requested review of the question, but the Court denied certiorari. *United States* v. *United States Vanadium Corporation*, 351 U.S. 939.

The instant petition shows that the problem continues to recur. The Delaware courts have not passed on the question, and there seems little likelihood that they will do so in the near future. Although we believe that the court below correctly in-

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[3] The four circuits which have passed upon the question are equally divided. In addition to the court below, the Seventh Circuit has held that Delaware law provides for survival of pending criminal proceedings. *United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936. The Sixth and Tenth Circuits have reached the contrary conclusion. *United States* v. *Line Material Company*, 202 F. 2d 929 (C.A. 6); *United States* v. *Safeway Stores*, 140 F. 2d 834 (C.A. 10); *United States* v. *United States Vanadium Corporation*, 230 F. 2d 646 (C.A. 10).

terpreted Delaware law, the issue remains unsettled in the lower courts. A substantial, if not the major, number of corporate defendants in Sherman Act cases are Delaware corporations, and the answer to whether a Delaware corporation may escape Sherman Act criminal punishment by dissolution should not depend upon the circuit in which the proceeding is brought. Indeed, unless resolved by this Court, the existing conflict is likely to lead to further litigation in those circuits which have not yet passed upon the question.

Accordingly, we do not oppose certiorari with respect to the first question presented.[4] If certiorari is granted, we shall also urge, as another ground for sustaining the judgment below, that where a dissolved corporation continues to exist under state law for many purposes (even if not for purposes of state criminal prosecution), it is an "existing" corporation (under Section 8 of the Sherman Act) which remains subject to criminal prosecution under that Act. See our petition for certiorari in the *Vanadium* case, *supra*, No. 848, October Term, 1955, pp. 8-11.

2. Petitioners also contend (Pet. 13) that the acts charged in the indictment were "compatible" with the Maryland Alcoholic Beverages Law, and therefore are not "indictable offenses under the Sherman Act." The court of appeals correctly held (Pet. 21), however, that the price-fixing conspiracy and the

[4] Although there is no conflict with respect to Maryland law, we believe that the Maryland statute is sufficiently similar to the Delaware law so that, if the Court does review the Delaware law, it should also review the Maryland law.

conspiracy and attempt to monopolize here charged, were not "in any way permitted, sanctioned, or encouraged by the announced governmental policy and law of the State of Maryland." It noted (Pet. 20-21) that the state alcoholic beverages law merely prohibits discrimination by manufacturers and wholesalers between customers; and that the regulatory power of the State Comptroller of the Treasury over alcoholic beverage prices is designed to preserve competition among retailers, and does not sanction a "horizontal" price-fixing conspiracy of the kind here charged. In short, as in *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299, the acts here charged (admitted by petitioners' plea of *nolo contendere*, see *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. 395, 412) "have no legal sanction under state law." Accordingly, "[t]he Sherman Act is not being enforced in this case in such manner as to conflict with the law of" Maryland, and "[w]e therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state" (*Frankfort Distilleries* case, *supra*).

Since Maryland law does not sanction petitioners' acts, there is no occasion to reach the broader question (Pet. 13-14) whether, if such acts were "compatible" with state law, they would be immune from prosecution under the Sherman Act. In any event, this Court has pointed out that although the Twenty-First Amendment "bestowed upon the states broad regulatory power over the liquor traffic within their territories," it "has not given the states plenary and exclusive power to regulate the conduct of persons

doing an interstate liquor business outside their boundaries." *Frankfort Distilleries* case, *supra; William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173.

CONCLUSION

If the petition for a writ of certiorari is granted, review should be limited to the first question presented.

Respectfully submitted.

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OCTOBER 1958

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OPINION BELOW

The opinion of the Court of Appeals (R. 68–74) is reported at 258 F. 2d 726. The opinion of the district court (R. 40–52) is reported at 138 F. Supp. 685.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1958 (R. 74). The petition for a writ of certiorari was filed on September 26, 1958, and was granted on November 10, 1958 (limited to Question 1 presented by the petition) (R. 75). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In granting the writ of certiorari in this case the Court limited the questions presented to the following:

Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?

STATUTES INVOLVED

At the time of the indictment the pertinent sections of the Sherman Act, 26 Stat. 209, as amended, provided:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 * * *. [15 U.S.C. 1.]
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by

fine not exceeding $5,000 * * *. [15 U.S.C. 2.]

SEC. 8. The word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. [15 U.S.C. 8.]

Section 278, Delaware General Corporation Law (Section 278, Title 8, Chapter 1, Delaware Code Annotated, 1953), provides in pertinent part:

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed.

Section 78(a), Article 23, Annotated Code of Maryland, 1951, provides in part as follows:

> The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. * * *

Other relevant provisions of the Delaware and Maryland Codes are set out in the Appendix, *infra*, pp. 28–30.

STATEMENT

On April 6, 1955, an indictment was returned charging 14 corporate manufacturers, 7 corporate wholesalers, 3 trade associations, and 31 individuals, with conspiring to fix the wholesale and resale prices of alcoholic beverages shipped in interstate commerce into Maryland, and with conspiring to monopolize and attempting to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act (R. 1–12). The gravamen of the price-fixing conspiracy was a scheme, enforced by boycott, to compel manufactures and wholesalers to establish "fair-trade" prices, and to compel retailers to observe such prices (R. 9).

Petitioners, which were wholly owned subsidiaries of defendant Schenley Industries, Inc. (Schenley), were 3 of the 14 corporate defendant manufacturers (R. 2). Two of them (Melrose Distillers, Inc. and CVA Corporation) were Maryland corporations; the third (Dant) was a Delaware corporation (R. 2).

On May 2, 1955—almost a month after the indictment was returned—petitioners were dissolved (R. 15–18, 22, 26–29). They then moved to dismiss the indictment on the ground, *inter alia*, that their dissolution abated the proceeding as to them (R. 14, 21, 25, 37–39).[1]

The district court denied petitioners' motions (R. 46–53). It ruled that "under the applicable Delaware and Maryland statutes, the corporate existence of the dissolved corporations continues to a sufficient extent to permit the prosecution of this criminal proceeding" (R. 52).

Petitioners (together with a number of other defendants) then pleaded *nolo contendere* (R. 60–65) and were fined the following amounts: Melrose, $5,000; CVA, $6,000; Dant, $7,500 (R. 55–57).

Upon appeal, the Court of Appeals unanimously affirmed. The court, noting that there is a "division of authority" among the circuits, held (R. 69–73) that the Delaware corporation statute, which provides for continuation after dissolution of "any [pending] action, suit, or proceeding," covers criminal proceedings. It further ruled (R. 73) that the Maryland statute "in all its essentials" is "of like effect"; and it stated (R. 71) that to accept petitioners' construction of those acts "would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequence of

[1] Upon arraignment on June 28, 1955, a plea of "not guilty" was entered for each petitioner.

their criminal acts by the simple process of voluntary dissolution."

Certiorari was sought to review this ruling and, also, whether the Maryland Alcoholic Beverages Law immunized the conspiracy from Sherman Act prosecution. This Court limited review to the first question (R. 75).

SUMMARY OF ARGUMENT

I. The voluntary dissolution of a corporation is not the same as the death of an individual, and the considerations requiring abatement of pending criminal actions in the latter situation do not apply to the case of a corporate dissolution. A fine levied upon a dissolved corporation would affect and punish the same persons as before dissolution, namely the stockholders. Permitting a corporate defendant, through voluntary dissolution, to escape criminal responsibility imposed upon it by the Sherman Act would undermine the deterrent effect of the law and make possible evasion of the consequences of a criminal act by transfer of a dissolved corporation's operations intact to a newly created corporation or to another division of its controlling parent. Consequently, considerations of public policy do not support giving to the state laws governing the continued existence of dissolved corporations the restrictive interpretations urged here by petitioners, which, in effect, would preclude any continuing criminal liability unless it is expressly provided for.

The broad provision in the Delaware corporation law that "any action, suit, or proceeding" begun

within a period of three years after dissolution shall not abate clearly encompasses criminal prosecutions. This is established by the ordinary and generally accepted meaning of the terms (particularly "proceeding"), by the use of the term "proceeding" in connection with criminal prosecutions in other provisions of the Delaware Code and in the Delaware Rules of Criminal Procedure, and by the weight of judicial authority construing this and similar language. Nor is a more restricted interpretation required by any other provision of the Delaware Code.

Similarly, the Maryland provision that dissolution shall not "abate any pending suit or proceeding" against the corporation encompasses criminal cause. Rather than supporting petitioners' position, the 1957 amendments to the Maryland Code establish that the statute, in its pre-amendment form applicable to this case, did include criminal proceedings.

II. The judgment below can be sustained on an alternative ground. Section 8 of the Sherman Act defines "person" as including corporations "existing under * * * the laws of any State." The section thus requires reference to state law only to determine whether a corporation "exists" under that law, and not whether state law permits the corporation to be prosecuted. Therefore, if state law continues corporate existence after dissolution, whether or not for purposes of state criminal prosecution, the dissolved corporation remains an "existing" one under Section 8 and continues subject to federal criminal prosecution under the Sherman Act. The test under the Sherman Act is corporate existence, not the nature and extent of

corporate powers and exemptions. Since dissolved corporations continue to exist for many purposes under both Maryland and Delaware law, petitioners "existed" within the meaning of Section 8 of the Sherman Act and could be prosecuted under that Act.

ARGUMENT

The narrow issue presented by this appeal is whether pending criminal prosecutions under the Sherman Act abated upon dissolution of the defendant Delaware and Maryland corporations. We shall first show that, under the Delaware and Maryland corporation statutes, pending criminal proceedings did not abate upon dissolution of the corporate defendant. As an alternative ground for sustaining the judgment below, we shall also urge (Point II, *infra*) that where a dissolved corporation continues to exist under state law for any purpose (even if not for purposes of state criminal prosecution), it is an "existing" corporation within the meaning of Section 8 of the Sherman Act and thus remains subject to criminal prosecution under that Act.

I. UNDER THE DELAWARE AND MARYLAND CORPORATION LAWS, A PENDING CRIMINAL PROCEEDING AGAINST A CORPORATION DOES NOT ABATE UPON THE DISSOLUTION OF THE DEFENDANT

This Court has stated that dissolution of a corporation works an abatement of a pending federal proceeding, unless the federal law or the law of the state of incorporation permits the continuance of the proceeding. *Defense Supplies Corp.* v. *Lawrence Ware-*

house Co., 336 U.S. 631, 634–5; *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U.S. 120, 124–125; *Oklahoma Gas Co.* v. *Oklahoma*, 273 U.S. 257, 259. In the instant case, the applicable federal law (Sec. 8, Sherman Act) includes within the purview of "persons" subject to criminal prosecution under Sections 1 and 2 of the Sherman Act, corporations "existing under or authorized by * * * the laws of any State * * *." Assuming that this provision makes the liability of a dissolved corporation to suit dependent upon whether the state of incorporation permits such suit (but see Point II, *infra*), we believe the court below correctly found that, under the Delaware and Maryland corporation statutes, the pending criminal proceeding did not abate upon corporate dissolution.

Preliminary to their contentions as to the applicable state laws, petitioners have advanced several policy arguments (Br. 10–21). They urge that the purpose of the criminal proceeding is punishment, and that a natural person may not be punished after death. They then argue that corporate dissolution must be equated to the death of a natural person, and, accordingly, that a dissolved corporation cannot be the subject of punishment. This conclusion is consistent with public policy, it is claimed, since the main function of the criminal proceeding—the prevention of further criminal acts—is accomplished by the dissolution.

Petitioners' analogy between corporate dissolution and the death of an individual "has not been the subject of universal admiration * * * and is by no means exact". *Defense Supplies Corp.* v. *Lawrence Ware-*

house Co., supra, at p. 634.[2] Criminal actions abate upon the demise of an individual because the levying of a fine would punish the individual's heirs and, in any event, the defendant is no longer able personally to defend against the charges. *United States* v. *Pomeroy,* 152 Fed. 279 (S.D.N.Y.), reversed on other grounds, 164 Fed. 324; *United States* v. *Dunne,* 173 Fed. 254; Marcus, *Suability of Dissolved Corporations,* 58 Harv. L. Rev. 675, 681–2. These considerations are inapplicable to the corporate defendant.

A corporation is the business instrumentality of its stockholders and, upon dissolution, the assets of a corporation go to its stockholders. A fine levied on the dissolved corporation would thus affect and punish the same persons as before dissolution—the stockholders. And these stockholders can retain counsel and defend the corporation against criminal charges just as well after dissolution as before. See, *e.g.,* Section 82(b), Article 23, Annotated Code of Maryland (1957); Section 279, Title 8, Delaware Code Annotated (1953). In *Alamo Fence Co. of Houston* v. *United States,* 240 F. 2d 179, 183 (C.A. 5), the court aptly stated:

> In the judicial climate of realism now prevailing, it may be doubted whether the dissolution of a defendant corporation *after* indictment can ever prevent the prosecution from proceeding for the punishment would be suffered by

[2] See *Addy* v. *Short,* 47 Del. 157, 163, 166; *Kelley* v. *Miss. Cent. R. Co.,* 1 Fed. 564, 569–70 (W.D. Tenn.); Marcus, *Suability of Dissolved Corporations,* 58 Harv. L. Rev. 675, 681–83; Comment, *Corporate Dissolution and the Anti-trust Laws,* 21 U. of Chi. L. Rev. 480, 485–86.

the same *real* persons, the stockholders and others financially interested in the corporation, whether the fine against the corporation were recovered before or after dissolution.

Accordingly, as the court below concluded (R. 71), permitting the dissolved corporation to escape criminal responsibility seriously offends public policy. See *United States* v. *Maryland and Virginia Milk Producers, Inc.*, 145 F. Supp. 374, 375 (D.C. D.C.).[3] This is particularly the case where the corporate dissolution has little or no significance, and the same stockholders retain control over the corporate assets and continue the business through the medium of a different corporation, or a partnership or other unincorporated entity. Thus, in the instant case, petitioners' assets were owned after dissolution by the parent corporation, Schenley, and simply became divisions of a new corporation created by Schenley (R. 19–20,

[3] Dissolution after indictment for violation of the Sherman Act has occurred several times. See *United States* v. *Safeway Stores*, 140 F. 2d 834 (C.A. 10); *United States* v. *Line Material Company*, 202 F. 2d 929 (C.A. 6); *United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936 (C.A. 7); *United States* v. *United States Vanadium Corp.*, 230 F. 2d 646 (C.A. 10), certiorari denied, 351 U.S. 939; *United States* v. *Borden Co.*, 28 F. Supp. 177 (N.D. Ill.); *United States* v. *King*, W.D. Texas, San Antonio Div., Cr. No. 13147, August 25, 1948; *United States* v. *Anchorage Retail Liquor Dealers Ass'n*, D. Alaska, Third Div., Cr. No. 2379, Feb. 9, 1951; cf. *United States* v. *Western Pennsylvania Sand & Gravel Ass'n*, 114 F. Supp. 158 (W.D. Pa.). The recent increase from $5,000 to $50,000 in the maximum fine for Sherman Act violations (Ch. 281, 69 Stat. 282, Public Law 135, 84th Cong., 1st Sess. (1955), may encourage corporate defendants to evade their criminal responsibility by changing their corporate structure through mergers and dissolutions, if petitioners' view prevails in this case.

46-47).[4] Criminal fines levied prior to dissolution would punish and deter the petitioners and, in reality, their controlling parent. Such fines, after dissolution, would serve the identical purpose.

In effect, petitioners' position is that Schenley could employ subsidiary corporations to violate the law and then, through the device of voluntary dissolution, escape the penalties imposed by the law upon petitioners for their criminal acts. Clearly, such "absolution" upon dissolution "breed[s] disrespect for law, if indeed it does not encourage lawlessness" (*United States* v. *Cigarette Merchandisers Ass'n*, 136 F. Supp. 214, at p. 215, n. 5; see, also, Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675, 703). It is no answer to say that corporate officials of petitioners, or the parent Schenley, can still be held criminally responsible. The same argument could be advanced as a reason for never holding any corporate subsidiary criminally liable. Schenley chose to employ these corporate subsidiaries and, as such, they could be held criminally responsible and fined. In

[4] Similarly, in *United States* v. *Safeway Stores*, 140 F. 2d 834 (C.A. 10) and *United States* v. *Borden Co.*, 28 F. Supp. 177, 182 (N.D. Ill.), the same subsidiaries were owned after dissolution by the same parent corporation; the dissolution constituted merely a simplification of the parent's corporate hierarchy. See, also, *Walling* v. *James* v. *Reuter, Inc.*, 321 U.S. 671, where the corporation continued in business with the same name but as an unincorporated entity.

[5] Petitioners claim (Br. 8) that their dissolution was caused by business reasons "independent of the indictment." But their arguments are equally applicable to a corporation which chooses dissolution solely as a strategem to escape criminal penalties. For this reason, petitioners' motive in dissolving must be regarded as immaterial.

this case, that quantum of punishment and deterrence which the law seeks to impose upon the offending corporation (and thus its stockholders) is evaded, if the proceedings against petitioners are held to abate.

These policy considerations establish that, just as in the case of civil liability,[6] there are compelling reasons why legislation dealing with a corporation's rights and obligations following voluntary dissolution should not permit escape from criminal liability. On the critical issue in this Point, whether the language employed in the particular state statutes does effect that result, these considerations should be given weight. We believe the court below properly construed the Delaware and Maryland statutes as permitting the continuance of criminal proceedings after dissolution.

The Delaware statute

Section 278, Title 8, of the Delaware Code (1953) provides in its second sentence that "any action, suit, or proceeding" begun by or against a corporation before or within a period of three years after dissolution shall continue "until any judgments, orders, or

[6] Under state law generally, a Sherman Act civil action brought by the Government would not be abated by dissolution. The Government sometimes files companion civil and criminal cases under the Sherman Act based on the same violations. It would be anomalous, indeed, if the criminal action, which is designed to impose punishment for past violation, were to abate on dissolution of the defendant while the civil suit, designed to terminate violations and prevent recurrence, were to remain pending. See *United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936, 940.

decrees therein shall be fully executed."[7] This language was added to the section, which previously talked only in terms of prosecuting or defending "suits" during the three-year period after dissolution (21 Del. Laws, Ch. 273, Sec. 36), by proviso in 1925 (34 Del. Laws, Ch. 112, Sec. 9).[8] While the section has not been construed by the Delaware courts as to the issue here involved, and there is no legislative history in the nature of hearings, reports or debates in the Delaware legislature with respect to the section or its amendments, it seems clear that by employing this broad language Delaware sought to include every kind of litigation. As the court stated in *United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936, 940 (C.A. 7), in construing this precise provision:

> The words "any action, suit, or proceeding" in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty. The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on the legislative intent.

To the same effect as to this Delaware provision, see *Bahen & Wright* v. *Commissioner of Internal Reve-*

[7] A similar section dealing with mergers provides that "Any action or proceeding pending by or against" the merged corporation "may be prosecuted as if such * * * merger had not taken place" (Sec. 261, Title 8).

[8] The language of the proviso was clarified by amendment in 1941 (43 Del. Laws, Ch. 132, Sec. 11) and recodified as the second sentence of the section in 1953 (Section 278, Title 8, Delaware Code Annotated, 1953).

nue, 176 F. 2d 538, 539 (C.A. 4); *United States* v. *Maryland and Virginia Milk Producers, Inc.,* 145 F. Supp. 374, 375.

This construction is further supported by the use Delaware itself has made of the word "proceeding." The Delaware Code frequently employs "proceeding" in connection with criminal prosecutions.[9] Thus, Section 1702, Title 11 (1953) begins "Whenever a corporation is informed against in a criminal proceeding * * *." See also Sections 3521, 5121, 5713, Title 11 (1953). And the Rules of Criminal Procedure for the Delaware Superior Court refer throughout to "criminal proceedings." See *e.g.,* Rule 1 "Scope" ("These rules govern the procedure * * * in all criminal proceedings"); Rule 2 "Purpose and Construction" ("These rules are intended to provide for the just determination of every criminal proceeding"), Del. Code Ann. (1953), Vol. 13, pp. 503, 504). In view of this usage of the word "proceeding," it seems likely that the language of Section 278 would have been expressly limited to "civil proceedings" had this limitation been intended.[10]

Other courts, dealing with different statutes, have concluded that these terms, and particularly "proceeding," include criminal prosecutions. *Caha* v.

[9] Where it uses some other term, this usually is the word "case."

[10] The 1953 recodification of the Delaware Code, which changed the proviso of Section 278 into the second sentence thereof, was enacted into law on February 12, 1953, and the legislative draftsmen thereof had before them the new Rules of Criminal Procedure which had been adopted by the Supreme Court of Delaware on November 6, 1952 to become effective on February 12, 1953. See Del. Code Ann. (1953), Vol. 13, p. 497.

United States, 152 U.S. 211, 214; *Alamo Fence Co. of Houston* v. *United States,* 240 F. 2d 179, 183; *United States* v. *Auerbach,* 68 F. Supp. 776, 780 (S.D. Calif.); *Singleton* v. *United States,* 290 Fed. 130, 132 (C.A. 4). That "proceeding" and "judgment" are commonly used in connection with criminal prosecutions is further evidenced by the terminology found in the Federal Rules of Criminal Procedure. See, *e.g.,* Rules 1, 2, 21, 29 (a), (b), 32(b), 33–36."

Petitioners rely upon *United States* v. *Safeway Stores,* 140 F. 2d 834 (C.A. 10); *United States* v. *Line Material Company,* 202 F. 2d 929 (C.A. 6); and *United States* v. *United States Vanadium Corp.,* 230 F. 2d 646 (C.A. 10), certiorari denied, 351 U.S. 939, in which the Delaware statute was held not to apply to criminal proceedings. In the latter case, the court simply adhered to the *Safeway* decision insofar as Delaware law was concerned, on the ground that "one panel of the court should not lightly overrule a decision by another panel" (230 F. 2d at pp. 648–649).

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[11] Petitioner cites (Br. 33) *Schwartz* v. *General Aniline and Film Corp.,* 305 N.Y. 395, in which the New York Court of Appeals (in a four to three decision) construed "action, suit, or proceeding", in a statute relating to reimbursement of corporate officials for litigation expenses, to exclude criminal trials. But the New York court noted that the terms could cover criminal proceedings, "if they stood alone" (p. 403), and based its narrow construction on what it deemed to be the controlling legislative history of the particular statute. The comparable New York corporate dissolution provision, which employs the term "action or proceeding", has been expressly construed to include criminal prosecutions. *United States* v. *United States Vanadium Corp., supra,* at pp. 649–50; *United States* v. *Cigarette Merchandisers Ass'n, supra,* p. 12; *In re Grand Jury Subpoena Duces Tecum,* 72 F. Supp. 1013 (S.D. N.Y.)

In doing so, the court indicated that members of the panel might not be "in full sympathy" with the *Safeway* decision (*ibid.*). And it took the opposite position with respect to a New York corporation upon a construction of Section 90 of the New York Stock Corporation Law, McK. Consol. Laws, Ch. 59, providing for continuance of any "action or proceeding then pending before any court or tribunal * * *."

In *Safeway* itself, the court placed great stress upon the fact that the corporations had been dissolved before the return of the criminal indictment (140 F. 2d at 836, 840), and in its interpretation of the Delaware statute ignored the words "action or proceeding" and considered only the word "suits."[12] In *Line Material*, the court held that "The dominating term of the section is the word 'suits' which stands alone in the enabling language of the section" (202 F. 2d at p. 932), and accordingly concluded that the addition of the proviso was without significance. Petitioners here advance a similar argument, relying upon the rules of *ejusdem generis* and *noscitur a sociis* to give the admittedly broader word "proceeding" a restrictive meaning (Br. 29-31).

While this line of argument might be available if all of the language being construed had appeared in the section as originally enacted, it ignores the fact that the broader terms "action" and "proceeding," as well as "judgment," were separately added to the section by the Delaware Legislature at a later date.

[12] The court in *Safeway* also construed a California statute which used the word "action" as not applying to criminal prosecutions (140 F. 2d at 838-39).

As the court pointed out in *United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936, 939 (C.A. 7):

> This is so whether the proviso be treated merely as explanatory or as an additional enactment. If viewed in the former light, the word "suit," which the legislature had previously employed and which sometimes but not generally included a criminal prosecution, was defined to include "any action" and "any proceeding." If viewed in the latter light, as we think more appropriate, the proviso was intended to and did become the substantive law. [Cf. *Addy* v. *Short, supra,* 47 Del. 157, 162–163, 165–166.]

Petitioners assert that Section 281, Title 8 (Appendix, *infra,* pp. 28–29), of the Delaware Code forbids "payment of a criminal fine levied against the corporation *after* its dissolution" (Br. 25) since it directs the trustee or receiver to pay "all allowances, expenses or costs", "special and general liens", and "other debts due from the corporation". These terms, petitioners assert, apply only to civil actions. But the fact that Delaware may have seen fit to include a special provision in its Corporation Law protecting the rights of creditors of dissolved corporations, does not mean that the trustees or receivers are precluded from taking such actions as may be required as a result of other "actions, suits or proceedings" saved by Section 278. In fact, Section 279 of the Corporation Law (Appendix, *infra,* p. 28) expressly empowers the trustees or receivers of such dissolved corporations generally "to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the un-

finished business of the corporation." There is thus no conflict in language in the Delaware Corporation Code requiring that the words "action," "proceeding," and "judgment" be given a meaning more restrictive than is generally the case.

The Maryland statute

The Maryland Corporation Code contains provisions similar to those of Delaware. Section 72(b), Article 23, Annotated Code of Maryland (1951) (now Section 76(b) of the 1957 Code), provides that the dissolved "corporation shall continue in existence for the purpose of * * * discharging any existing debts and obligations, * * * and doing all other acts required to liquidate and wind up its business and affairs." Section 78(a), Article 23 (1951), provided at the time of the indictment [13] that dissolution shall not "abate any pending suit or proceeding by or against the corporation". The court below found these provisions to be in all essentials equivalent to those of Delaware and accordingly reached a similar result with respect to the two Maryland corporations (R. 73).[14]

Petitioners, focusing on the language "existing debts and obligations" as contained in Section 72(b),

[13] This provision was amended in 1957. The effect of the amendment on this case is discussed below (pp. 21–23).

[14] The Maryland courts have not passed on the issue here presented. However, in *Diamond Match Company* v. *State Tax Commission*, 175 Md. 234, 245, the Maryland Court of Appeals indicated the broad scope of these provisions, stating "These provisions are broad and intended to cover every liability, although of an undetermined amount * * *." No reason exists for excluding undetermined criminal liability.

above (and also in Section 74(b) (now Section 78(b))—see Appendix, *infra*, pp. 29–30), argue that the language of Section 78(a) precluding the abatement of "any pending suit or proceeding" must be limited to civil suits to avoid internal inconsistency among the several provisions of Article 23 of the Maryland Code. But even assuming the correctness of petitioners' unsupported assertion that the words "existing debts and obligations" do not encompass criminal liability under an existing indictment,[18] there is no conflict between provisions for the orderly liquidation of corporate assets and the provision continuing "any pending * * * proceeding" against the dissolved corporation. The corporation is continued in existence "for the purpose of * * * doing all other acts required to * * * wind up its business and affairs" (Section 72(b)); and the trustees are similarly empowered "to do all other acts and things consistent with law * * * necessary or appropriate to carry into effect * * * the winding up of its affairs" (Section

[18] In *United States* v. *Brakes, Inc.*, 157 F. Supp. 916 (S.D.N.Y.), the court held that criminal action is an action upon a "liability or obligation," within the meaning of the New York dissolution statute. And, in *In re Grand Jury Subpoenas Duces Tecum*, *supra*, p. 16, the court, in construing the same dissolution statute, stated that the dissolved corporation's "liability to the United States, both civil and criminal, if violations of the Sherman Act occurred, had become fixed" (p. 1021), and was unaffected by dissolution. So also, petitioners' violations of the Sherman Act resulted in an "existing obligation" to the United States within the meaning of Sections 72(b) and 74(b).

74(b)). The payment of criminal fines is clearly permissible under these broad powers.[16]

Petitioners also cite (Br. 23–24) the 1957 amendment to Section 78(a) (now Section 82(a)), which deleted the clause "nor shall such dissolution abate any pending suit or proceeding by or against the corporation * * *." They concede, apparently in view of Section 3 of Article 1 of the Annotated Code of Maryland, 1957,[17] that this amendment is not controlling here, and rely on the 1957 changes "solely insofar as they throw light on what those statutes meant before the changes" (Br. 23). Petitioners assert that the deleted provision is now embodied in

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[16] Significantly, the receiver of a dissolved corporation is not specifically vested with power to pay either debts or criminal fines. Instead, he has "all powers necessary" to close the affairs of the corporation (see Section 77(a), now 81(a); Appendix, *infra*, p. 30).

[17] This Section provides:

> The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify, or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability.

Rule 222 of the Maryland Rules of Procedure, Annotated Code of Maryland (1957), which provides that "An action by or against a corporation shall not abate by reason of the dissolution * * *." They urge that "action" does not include criminal proceedings, and that in any event Rule 222 applies only to civil actions since the rules pertaining to criminal proceedings commence at Rule 701.

But, conceding that Maryland Rule 222 is applicable only to civil suits in view of the definition of "action" in Rule 5(a),[18] the 1957 changes establish that the statute, prior to amendment, did include the criminal proceeding. For, the changes make clear that in Maryland the word "proceeding" is associated with criminal prosecutions. Thus, Rule 5(a) itself refers to "criminal proceedings" (note 18); the 1956 order adopting the rules makes them applicable "to all actions and criminal proceedings" (Annotated Code of Maryland, 1957, Maryland Rules, Vol. 9, p. 216); and the criminal rules refer to "criminal proceedings" (Rules 725(a), 725(b)(2)), as distinguished from "civil actions" (Rule 727(c)).[19] Clearly Section 78(a), in its pre-amendment form applicable to this case (see note 17, *supra*, p. 21), included the criminal

[18] Rule 5(a), Maryland Rules of Procedure, Annotated Code of Maryland (1957), provides in pertinent part: "'Action' shall not include a criminal proceeding."

[19] Significantly, the 1951 Maryland rules also employed "proceedings" in connection with criminal prosecutions. See, *e.g.*, Rule 3(a) of General Rules of Practice and Procedure, Part Four, Vol. 3, Annotated Code of Maryland (1951), p. 4886 ("Pleadings in criminal proceedings * * *"). These rules were interrelated with the Code provisions. Cf. Rule 9 of the General Rules of Practice and Procedure, Part Four (1951).

proceeding when it specified "any pending * * * proceeding".

II. A DISSOLVED CORPORATION WHICH CONTINUES TO EXIST FOR ANY PURPOSE IS AN "EXISTING" CORPORATION WITHIN THE MEANING OF SECTION 8 OF THE SHERMAN ACT AND THEREFORE REMAINS SUBJECT TO CRIMINAL PROSECUTION UNDER THAT ACT

There is an alternative ground for sustaining the judgment below. Sections 1 and 2 of the Sherman Act provide that any "person" who combines or conspires to restrain, or who monopolizes, interstate commerce may be convicted of violation thereof. Section 8 defines "person" as including "corporations * * * existing under or authorized by the laws of any State". Thus, Section 8 requires reference to state law solely to determine whether a corporation "exists" under that law.[20] We urge that if state law

[20] If it were not for the provision of Section 8 of the Sherman Act requiring reference to the state law to determine the status of a corporate criminal defendant, *i.e.*, whether it "exists," the question of continuing liability might be determinable under general federal law (see *Schreiber* v. *Sharpless*, 110 U.S. 76 (Pet. Br. 17–18); cf. *Barnes Coal Corporation* v. *Retail Coal Merchants Association*, 128 F. 2d 645, 648 (C.A. 4); *United States* v. *Leche*, 44 F. Supp. 765 (E.D. La.)). Although we need not reach that issue here, we believe it should be held that pending federal criminal proceedings do not abate upon dissolution of a corporate defendant. For the question is not to be determined merely "by a consideration of the state of the common law * * * in the reign of Edward III, or * * * at the time of the American Revolution," but "* * * from the application of reason to the changing conditions of society". *Barnes Coal Corporation* v. *Retail Coal Merchants Association*, *supra*, at p. 648; see also *Funk* v. *United States*, 290 U.S. 371; *Hurtado* v. *California*, 110 U.S. 516, 530; *Shayne* v. *Evening Post Publishing Co.*, 168 N.Y. 70. For the reasons previously

continues corporate existence after dissolution, whether or not for purposes of state criminal prosecution, the dissolved corporation remains an "existing" one under Section 8 and therefore continues subject to federal criminal prosecution under the Sherman Act. Cf. *Bahen & Wright, Inc.* v. *Commissioner of Internal Revenue,* 176 F. 2d 538, 540 (C.A. 4).

The language of Section 8, read in its ordinary and natural sense, means simply that any corporation which exists under state law may be prosecuted under the Sherman Act. It does not say, as petitioners would in effect have it, that the corporation must "exist *and be capable of being criminally prosecuted under state law.*" The "sweeping" definition of "person" in Section 8 was plainly designed "to preclude any narrow interpretation" of the categories of persons subject to criminal penalties for violation of the Sherman Act (*United States* v. *Cooper Corp.,* 312 U.S. 600, 607). Congress clearly did not intend to leave enforcement of the Sherman Act dependent on whether the particular State would permit the United States to bring suit. *Northern Securities Co.* v. *United States,* 193 U.S. 197, 344–47.

Thus, if a State, in authorizing a corporation and specifying the purposes for which it exists, explicitly provided that the corporation could not be criminally prosecuted, such a provision would not immunize the

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developed (pp. 8–13), the drastic change in the role of the corporation in society requires that there be no abatement. See *Alamo Fence Co. of Houston* v. *United States*, 240 F. 2d 179, 183 (C.A. 5); see Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675, 677–80, for a discussion of the corporate role in early English society.

corporation from criminal proceedings under the federal antitrust laws. *Northern Securities Co.* v. *United States,* 193 U.S. 197, 345–346; *Alamo Fence Co. of Houston* v. *United States,* 240 F. 2d 179, 183 (C.A. 5). Similarly, during the dissolution period, a state cannot continue the corporation in existence for purposes it specifies, and yet immunize it from Sherman Act prosecution. As the court stated in the *Alamo* case (p. 183), "* * * we have no doubt that a state can no more continue the existence of one of its corporations and at the same time immunize it against criminal prosecution, than it could have created the corporation in the first instance with such immunity." See, also, *United States* v. *P. F. Collier & Son Corp.,* 208 F. 2d 936, 940–941 (C.A. 7) (concurring opinion). The fact of corporate existence, and not the nature and extent of corporate powers and exemptions, is the statutory test under the Sherman Act.

Under both Maryland and Delaware law, dissolved corporations continue to exist for many purposes. Thus, Maryland provides that "the corporation shall continue in existence" for the purpose of paying debts, collecting and distributing assets, and "doing all other acts required to * * * wind up its business * * *" (Section 76(b), Annotated Code of Maryland (1957)). Delaware provides that all corporations shall "be continued" as "bodies corporate" for three years after dissolution for purposes of prosecuting or defending litigation pending at dissolution or instituted within that period, and of "enabling them gradually to settle and close their business" (*supra,* pp. 3, 13–14, 18–19). In *Addy* v. *Short, supra,* the Dela-

ware Supreme Court made it clear that a dissolved corporation continues in existence during this three-year period, with "[w]hatever rights it had, of whatever nature, * * * preserved in full vigor" (47 Del. 157, 163). See, also, *United States* v. *Bates Valve Corp.*, 39 F. 2d 162 (D. Del.).[21]

In short, "the State has elected to keep the corporation in existence, maimed but still alive", and it cannot "preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law." Mr. Justice Cardozo, dissenting in *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U.S. 120, 131.[22] Having been continued in existence by the applicable state laws, petitioner "existed" within the meaning of Section 8 of the Sherman Act and could be prosecuted under that Act.

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[21] The status of corporations during a statutory dissolution period has generally been regarded in this fashion. See, *e.g.*, *United States* v. *P. F. Collier & Son Corp.*, *supra*, at p. 940 (concurring opinion); *Stentor Electric Manufacturing Company* v. *Klaxon Company*, 115 F. 2d 268, 271 (C.A. 3); *Cushman* v. *Warren-Scharf Asphalt Paving Company*, 220 Fed. 857, 862 (C.A. 7); *In re Booth's Drug Store, Inc.*, 19 F. Supp. 95, 96–97 (W.D. Va.); *Hunt* v. *Columbian Insurance Company*, 55 Me. 290.

[22] Justices Stone and Black joined in this dissent. The *Chicago Title* case did not decide the issue here presented. It held only that a dissolved Illinois corporation could not, after expiration of the two-year period within which dissolved corporations could sue or be sued under state law, file a petition for reorganization under Section 77B of the Federal Bankruptcy Act. The holding is not dispositive of the question whether a pending federal criminal action is abated by dissolution of a corporate defendant which, under state laws, continues to exist thereafter for many purposes.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Section 279, Delaware General Corporation Law, Title 8, Chapter 1, Delaware Code Annotated, 1953, provides:

> When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor or stockholder of the corporation, at any time, may either appoint one or more of the directors thereof trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

Section 281, Delaware General Corporation Law, Title 8, Chapter 1, Delaware Code Annotated, 1953, provides:

> The trustees or receivers of a dissolved corporation, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be

sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose. If there shall be any balance remaining after the payment of the debts and necessary expenses, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives.

Section 72(b), Article 23, Annotated Code of Maryland, 1951 (now Section 76(b) of the 1957 Code) provides:

> (b) *Time dissolution effective; continuance of existence for certain purposes.*—The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs.

Section 74(b), Article 23, Annotated Code of Maryland, 1951 (now Section 78(b) of the 1957 Code) provides:

> (b) *Powers of directors as trustees.*—In the liquidation of the corporation and the winding up of its affairs, such trustees shall, until a receiver is appointed by such court, be vested, in their capacity as trustees, with full title to all the property and assets of the corporation. They shall proceed to collect and distribute the assets of the corporation, applying such assets to the extent available to the payment, satisfaction and discharge of existing debts and obligations of the corporation, including necessary expenses of liquidation, and distributing the

remaining assets among the stockholders. They shall have power to carry out the contracts of the corporation; they may sell all or any part of the assets of the corporation at public or private sale; they may sue or be sued in their own names as trustees, or, notwithstanding such dissolution, in the name of the corporation; and they shall have power to do all other acts and things consistent with law and the charter of the corporation, necessary or appropriate to carry into effect the liquidation of the corporation and the winding up of its affairs. The will of a majority of the trustees shall govern.

Section 77(a), Article 23, Annotated Code of Maryland, 1951 (now Section 81(a) of the 1957 Code) provides:

> (a) *As to assets and liabilities.*—The receiver of any corporation of this State appointed by a court pursuant to this Article, whether the dissolution of the corporation is voluntary or involuntary, shall be vested with full title to all the property and assets of the corporation and with full power to enforce obligations or liabilities in favor of the corporation; he shall proceed to liquidate the assets of the corporation and close its affairs under the supervision of the court and shall have all powers necessary for that purpose.

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